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UNITED STATES DISTRICT COURT.

DISTRICT OF MASSACHUSETTS.

CASE No. 53-79-M.

ANTHONY PINO, *Petitioner,*

v.

HENRY NICOLLS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, *Respondent.*

Portions of Docket Entries.

Dec. 18, 1953—Petition for writ of habeas corpus filed.

Dec. 22, 1953—Respondent's return filed.

Dec. 22, 1953—McCarthy, J. Ordered matter set for hearing on merits on Monday, January 4, 1954, at 10:00 a.m., respondent to produce body of petitioner at hearing on January 4, 1954 at 10:00 a.m.

Dec. 22, 1953—McCarthy, J. Ordered that writ of habeas corpus issue, returnable December 23, 1953 at 11:00 a.m.

Dec. 23, 1953—McCarthy, J. Hearing on return of writ of habeas corpus. Motion for bail denied, request for ruling of law denied. Hearing continued to January 4, 1954.

Dec. 28, 1953—Marshall's return on writ of habeas corpus, with service on Dec. 23, 1953, filed.

Dec. 28, 1953—Traverse filed by petitioner.

Jan. 4, 1954—McCarthy, J. Hearing on writ of habeas corpus continues. Evidence. Petitioner's motion to

produce allowed by agreement. Motion to amend respondent's return filed and allowed after hearing.

Jan. 5, 1954—McCarthy, J. Hearing on writ of habeas corpus continues. Arguments.

Feb. 1, 1954—McCarthy, J. Order discharging writ and dismissing petition entered.

Feb. 1, 1954—Notice of appeal to the Court of Appeals under Rule 73(b), discharging writ February 1, 1954.

Feb. 1, 1954—Motion for bail pending appeal.

Feb. 2, 1954—McCarthy, J. Hearing on motion for bail pending appeal. Denied.

Feb. 2, 1954—Hearing on request for rulings of law. Denied.

Feb. 2, 1954—Notice of appeal from order denying petitioner's motion for bail pending appeal, filed.

Petition for Writ of Habeas Corpus.

To the Honorable the Judges of the District Court for the District of Massachusetts.

Respectfully represents your petitioner, Anthony Pino, and says:

I

The petitioner, Anthony Pino, is a legal resident of the United States whose home is at 633 Morrissey Boulevard, Wollaston, Massachusetts. He has resided in the United States at least since May of 1908 and is married to an American citizen whom he supports.

II

The respondent, Henry Nicolls, is District Director of Immigration and Naturalization for the Second District of the Immigration and Naturalization Service of the Department of Justice. The Second District includes Massachusetts where the petitioner lives and is now confined. The

respondent has charge, direction and control of all matters relating to the arrest and deportation of aliens in this District and has custody and supervision of all arrested aliens. He is the highest official in charge of said Service in this District and is duly authorized to effectuate and execute orders and warrants of deportation.

III

On Dec 18 1953 the petitioner was arrested pursuant to an order for deportation made by a Special Inquiry Officer on March 23, 1953, and affirmed on appeal by the Board of Immigration Appeals, United States Department of Justice on August 11, 1953. The Petitioner is presently confined by the respondent within the jurisdiction of this Court and, upon information and belief, is in immediate danger of deportation.

IV

The petitioner had been at liberty under bail from January 10, 1953 until his arrest on Dec 18, 1953 pursuant to the aforesaid order of deportation.

V

The aforesaid order of deportation is based on Section 241(a)(4) of the Immigration and Nationality Act (8 U.S.C.A. Section 1251 (a)(4)) which provides for the deportation of an alien:

> "who at any time after entry is convicted of two crimes involving moral turpitude. . . . regardless of whether confined therefor. . . . . ."

The charges on which the order is based are that in 1928 the petitioner had been convicted of abuse of a female child under Massachusetts General Laws Chapter 265, Section 23 and that in 1949 the petitioner had been convicted of the larceny of a dozen golf balls.

VI

The petitioner has not been convicted of the larceny of twelve golf balls since that case is presently pending in the Third District Court of Eastern Middlesex, Cambridge, Massachusetts, the case having been placed on file. If and when the petitioner is sentenced he will have a right of appeal to the Superior Court and to a trial de novo. Furthermore, there is presently pending in said Cambridge District Court a motion for a new trial in that case filed on February 4, 1953, on which motion the decision was reserved on February 15, 1953.

VII

The deportation order is further invalid because:

A. The order is based on events and proceedings which occurred prior to the effective date of the Immigration and Nationality Act and are therefore not grounds for deportation provided under said Act; nor is said order of deportation valid under any other statute relating to deportation.

B. The crime of abuse of a female child, Massachusetts General Laws Chapter 265, Section 23, does not necessarily involve moral turpitude.

C. Previous deportation proceedings have adjudged the petitioner a non-deportable alien and that status is continued by Section 405(a) of the Immigration and Nationality Act.

D. The retrospective application of the Immigration and Nationality Act threatens the petitioner's deportation on account of events and proceedings which occurred in the past as to the effect of which the petitioner was not forewarned. The petitioner who has been a resident of the United States for all of his adult life and most of his childhood and is married to an American citizen is, by such retrospective application, being deprived without fore-

warning of his status as a non-deportable alien previously adjudicated in deportation proceedings substantially because of the alleged theft of a dozen golf balls with reference to which no sentence was imposed. Such application of the Immigration and Nationality Act is so harsh and unjust as to deprive the petitioner of due process of law under the Fifth Amendment to the United States Constitution.

E. The proceedings on which the deportation order was based were illegal and invalid as set out in the following paragraphs VIII to XIII inclusive.

VIII

The proceedings culminating in the aforesaid order of deportation began prior to January 5, 1953, on which date an Acting Director of the Immigration and Naturalization Service issued a warrant for the arrest of the petitioner charging that he was subject to deportation for the reasons, as set out in the warrant, that he had been convicted of two crimes involving moral turpitude, to wit: assault with intent to rape and rape; and larceny.

IX

On information and belief the warrant of arrest of January 5, 1953 was issued without a proper determination either by the applicant for that warrant or by the Acting Director who issued that warrant that a prima facie case for deportation existed; nor, on information and belief, was the Acting Director authorized to issue that warrant.

X

Thereafter, a Special Inquiry Officer conducted proceedings in this matter, presenting the case of the Immigration Service as prosecuting attorney and simultaneously hearing that case as judge. At the commencement of the proceedings the Special Inquiry Officer, without giving the

petitioner adequate time to prepare his case, embarked on an investigation to determine not only whether the petitioner was deportable as charged, but (as the said Special Inquiry Officer stated) whether the petitioner was deportable "under any charge contained within the provisions of the Immigration and Nationality Act." In accordance with this stated purpose the Special Inquiry Officer introduced and admitted evidence far beyond the scope of the warrant including unverified reports of the Federal Bureau of Investigation containing miscellaneous investigative leads, as well as the petitioner's criminal record. Throughout the proceedings the Special Inquiry Officer had in his possession and referred to a file which, on information and belief, referred to the petitioner, the contents of which the Special Inquiry Officer refused to disclose to the petitioner and his attorney, and which, on information and belief, he had studied prior to and during the proceedings.

XI

During the course of the proceedings it appeared that the charge in the warrant that the petitioner had been convicted of intent to rape and rape was without foundation. The Special Inquiry Officer thereupon lodged a new charge, namely, that in 1928 the petitioner had been convicted of abuse of a female child under Massachusetts General Laws Chapter 265, Section 23.

XII

At the close of the proceedings, despite a motion raising these and other matters, the Special Inquiry Officer refused to hear any argument and adjourned the proceedings.

XIII

The conduct of these proceedings violated the Immigration and Nationality Act and the Rules and Regulations

issued thereunder by the Attorney General (17 F.R. 11469, December 18, 1952; Immigration and Nationality Regulations 8 C.F.R.) and deprived the petitioner of due process of law under the Fifth Amendment to the United States Constitution in the following respects:

A. The proceedings were based on a warrant issued in violation of Section 242.1, 242.12 and 242.13 of the Immigration and Nationality Regulations as set out in paragraph IX.

B. The admission of irrelevant and hearsay evidence, the refusal to give the petitioner time to prepare his case before the Special Inquiry Officer introduced evidence, the consideration by the Special Inquiry Officer of a secret file unavailable to the petitioner, and the denial to the petitioner of subpoenas and his right to argue denied the petitioner a fair and impartial hearing as required by Section 242.53(b) of the Immigration and Nationality Regulations and by the Fifth Amendment to the United States Constitution.

C. The lodging of a new charge by the Special Inquiry Officer hearing these proceedings violated Section 242(b) of the Immigration and Nationality Act, 8 U.S.C.A. Section 1252(b), which (with exceptions not here material) prohibits the Special Inquiry Officer from participating in prosecuting functions.

D. The conduct of the proceedings by the Special Inquiry Officer assigned to hear this case as an investigation into the deportability of the petitioner apart from specific charges, and, on information and belief, the Special Inquiry Officer's investigation of this and other cases prior to these proceedings violated Section 242(b) of the Immigration and Nationality Act, 8 U.S.C.A. Section 1252(b).

E. The conduct by the same Special Inquiry Officer of the investigation, prosecution and adjudication of this case either apart from or together with the conduct specified in

sub-paragraph D of this paragraph XIII deprived the petitioner of due process of law as required by the Fifth Amendment to the United States Constitution.

XIV

The petitioner has exhausted all his administrative remedies, having appealed the aforesaid deportation order to the Board of Immigration Appeals, United States Department of Justice, which appeal was denied.

XV

The petitioner's present confinement and detention by the respondent pursuant to the aforesaid deportation order are therefore illegal and unless this Honorable Court intervenes the petitioner will be illegally deported from the United States.

Wherefore, the petitioner prays:

1. That a writ of habeas corpus be issued herein directing the respondent to produce before this Honorable Court the body of the petitioner together with the cause of his detention (including the complete record of the proceedings in this matter which record the petitioner cannot make available to the Court);

2. That the petitioner be discharged from custody;

3. For such other orders, including (but not limited to) orders regarding the petitioner's release on bail, as may be appropriate.

ANTHONY PINO

UNITED STATES OF AMERICA
COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK; ss

Anthony Pino being duly sworn on his oath deposes and says that he has read and is familiar with the foregoing

petition and that he knows the contents thereof and believes the same to be true.

ANTHONY PINO

Subscribed and sworn to before me, this 18th day of Dec, 1953.

MANUEL KATZ
Notary Public

Respondent's Return.

Now comes Henry Nicolls, District Director of the Immigration and Naturalization Service, Boston, Massachusetts, and makes the following return to the order to show cause:

I

Respondent admits the allegations of paragraph I of the Petition but as to the allegation that the Petitioner supports his wife the Respondent has no information sufficient to form an opinion as to same.

II

Respondent admits the allegations contained in paragraph II of the Petition.

III

Respondent admits the allegations contained in paragraph III of the Petition.

IV

Respondent admits the allegations contained in paragraph IV of the Petition.

V

Respondent admits the allegations contained in paragraph V of the Petition.

VI

Respondent denies the allegations of the first two sentences of paragraph VI of the Petition, and says that the record shows that the Petitioner has been convicted of the crime of larceny, as alleged in the warrant of deportation. With respect to the allegations contained in the third sentence of said paragraph, the respondent, upon information and belief, believes that a motion for a new trial has been filed, but has no information as to whether same is still "pending"; and, further, the Respondent says that even if these allegations are true, they have no legal effect upon the propriety or the validity of the deportation proceedings in this case.

VII

Respondent denies all the allegations of paragraph VII of the Petition, including the allegations of all subdivisions thereof, except the allegation that the Petitioner "has been a resident of the United States for all of his adult life and most of his childhood and is married to an American citizen", which is admitted.

VIII

Respondent admits the allegations of paragraph VIII of the Petition.

IX

Respondent denies the allegations contained in paragraph IX of the Petition.

X

Respondent denies the allegations of paragraph X of the Petition, except the allegation that "Throughout the proceedings the Special Inquiry Officer had in his possession and referred to a file which, on information and belief, referred to the Petitioner, the contents of which the Special

Inquiry Officer refused to disclose to the Petitioner and his attorney", which is admitted; and, further, the Respondent says that the hearings accorded Petitioner were in accordance with the procedural requirements of the Immigration and Nationality Act of 1952, Title I, Sec. 242 (b), 66 Stat. 208, 8 U.S.C.A. 1252(b), and with the regulations promulgated thereunder, 8 CFR 242 et seq.

XI

Respondent denies the allegations contained in the first sentence of paragraph XI of the Petition, and says that the charge in the warrant in this respect was inaccurate only in its descriptive designation of the crime and not in substance. The Respondent admits the allegations contained in the second sentence of paragraph XI but submits, if the same becomes material, that the lodged charge merely corrected an error of form and was a "new charge" only in the most limited sense of the term.

XII

Respondent admits the allegation that the Special Inquiry Officer refused to hear oral argument as such on the Petitioner's motion to quash or dismiss the deportation proceedings, but says that the Special Inquiry Officer ruled thereon after examination of said motion and, further, that counsel for Petitioner presented each of his objections separately during the hearing and obtained rulings thereon.

XIII

Respondent denies all the allegations of paragraph XIII of the Petition, including the allegations contained in all subdivisions of said paragraph.

XIV

Respondent admits the allegations contained in paragraph XIV of the Petition.

XV

Respondent denies the allegations contained in paragraph XV of the Petition.

XVI

Further answering, the Respondent says that:

A. The Petitioner is being lawfully detained under a valid warrant of deportation;

B. The Petitioner was afforded a fair and impartial hearing before a duly authorized hearing officer of the Immigration and Naturalization Service;

C. The findings of the hearing officer were based upon substantial evidence of probative value;

D. The actions of the officials of the Immigration and Naturalization Service were in conformity with law and were based upon a proper interpretation of the statutes involved.

Wherefore, the Respondent respectfully requests that the Petition for Writ of Habeas Corpus be dismissed.

HENRY NICOLLS,
District Director Immigration
and Naturalization Service
Boston, Massachusetts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. BOSTON, December 22, 1953.

Then personally appeared the above-named Henry Nicolls, District Director, Immigration and Naturalization Service, United States Department of Justice, and made oath that the above statements are true to the best of his knowledge and belief.

Before me,

Notary Public

My commission expires:

Motion to Amend Respondent's Return.

Now comes the Respondent and moves to amend its Return by substituting in place of paragraph VI the following:

> Respondent denies the allegations of the first two sentences of paragraph VI of the Petition, and says that the record shows that the Petitioner has been convicted of the crime of larceny, as alleged in the warrant of deportation. With respect to the allegations contained in the third sentence of said paragraph, the Respondent admits that a motion for a new trial was filed on February 4, 1953, on which motion the decision was reserved on February 15, 1953, but says further that on December 23, 1953, said motion was denied by the Court.

HENRY NICOLLS,
District Director, Immigration and Naturalization Service, Boston, Massachusetts

ANTHONY JULIAN
United States Attorney
By: JEROME MEDALIE
Assistant U. S. Attorney
Attorneys for the Respondent

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. BOSTON, January 4, 1954.

Then personally appeared the above-named Jerome Medalie, Assistant U. S. Attorney, and made oath that the above statements are true to the best of his knowledge and belief.

Before me,

Notary Public

My commission expires:

CERTIFICATE OF SERVICE

SUFFOLK, ss. BOSTON, MASSACHUSETTS
January 4, 1954

I, Jerome Medalie, Assistant U. S. Attorney, hereby certify that I have this day handed a copy of the within Motion to Paul T. Smith, attorney for the petitioner, in open court.

JEROME MEDALIE
Assistant U. S. Attorney

Portions of Return Submitted by Respondent in Response to Petitioner's Motion.*

WARRANT FOR ARREST OF ALIEN
UNITED STATES OF AMERICA
Department of Justice
Washington

No. E-1356

To Chief, Investigations Section, Boston, Massachusetts
Or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Anthony Pino who entered this country at the Port of Boston, Mass. ex S.S. Romanic on the 25th day of May 1908 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

---

*Matter under this heading was furnished by respondent pursuant to petitioner's motion "that the respondent be ordered to correct his return by incorporating therein the record of proceedings . . ." This is erroneously characterized by the court below and in the docket entries as a "motion to produce." See pages 35-38, incl., of Transcript of Record of Hearing January 4, 1954, not printed.

Section 241(a)(4) of the Immigration and Nationality Act, in that, he at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit: assault with intent to rape and rape; and larceny.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1953."

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 5th day of January 1953.

Acting District Director—Boston

Port of Boston Mass.
Date Jan 10, 1953

WARRANT FOR ARREST OF ANTHONY PINO

Served by me at Wollaston Mass on Jan 10, 1953, at 8 Boston Mass
am. Alien was then informed as to cause of arrest, the conditions of release as provided therein, advised as to right of counsel and furnished with a copy of this warrant.

MARTIN R SCHOFIELD

Conditions of release if eligible

Complied with the alien registration Act of 1940 and assigned Number A 2-136-979.

EMILE F. LE VIN
Investigator Boston District.

[Portions of Transcript of Hearing before the Special Inquiry Officer, Dated January 28, 1953, Examination of Anthony Pino (Lawrence F. O'Donnell, Attorney of Record).]

• • •

(2)

Q. Are you ready to proceed with the hearing at this time? A. No.

Q. What is your reason for saying, "No"? A. We respectfully request a continuance, under the circumstances of this case, for purposes of allowing the general notoriety associated with it to subside a reasonable time and more time to prepare by virtue of the fact that the McCarran Act is comparatively recent legislation and difficult points within the McCarran Act are yet to be resolved.

(3)

Q. For your information, any decision entered in this case by me will not be predicated on any notoriety that the respondent may receive, but solely on the evidence presented and developed during the hearing. Every opportunity will be furnished you to prepare your defense in this case. Do you understand? A. I do.

Q. Your motion is denied at this time. Do you understand?

Is it seasonable at this time to take an exception to the denial.

• • •

(7)

Q. What was the outcome of the various deportation proceedings granted you? A. I think it was continued to see if I could get a pardon and I received a pardon on one felony that time. As a result of the pardon, the proceedings were terminated on the grounds that I was not deportable.

(8)

Q. On the basis of your discussion of felonies, it is concluded by the Special Inquiry Officer that you have been arrested in civil or criminal proceedings. Offhand, can you tell me about how many times you have been arrested?

By Counsel: I was wondering if I might interject here. For purposes of information, I was wondering how extensive the pursuit of that information would be. In light of Section 241(a)(4) setting out the two particular violations that he is confronted with now, is it necessary to go into the entire record at this time?

By Special Inquiry Officer: The question is deemed necessary in arriving at a decision in this case and it is requested that the respondent answer to the best of his ability.

By Counsel: That would go beyond the charges listed here.

By Special Inquiry Officer: That is correct.

By Counsel: I take an exception of going beyond what is listed here, on the grounds that it could be prejudicial to the respondent.

By Special Inquiry Officer: A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act. The objection is overruled.

Special Inquiry Officer to Respondent: Q. It is requested that the respondent answer the question. How many times have you been arrested? A. Quite a few; I couldn't say the exact amount.

Q. I show you a complete photostatic report of the Massachusetts Board of Probation, in the case of Toney Peno, Antonio Pino, or Anthony Pino. After you have examined this record, advise me if it relates to you. (Recess

declared while respondent and counsel examine document.)
A. Yes, to the best of my knowledge.
(9)

Q. This photostatic copy of the Massachusetts Board of Probation, together with decoded copy thereof, will be made a part of the record as Exhibit #3. Is this understood? A. Yes.

Q. I show you a report from the Identification Division of the Federal Bureau of Investigation bearing the F.B.I. number 169123, dated January 27, 1949, which is the latest available to me at this time. After an examination of this document, advise me whether or not it relates to you?

(Recess permitted by Special Inquiry Officer for purpose of consultation between respondent and counsel.)

By Counsel: This record of January 31, 1949, received by the Immigration authorities, relates to Mr. Pino but he does not necessarily acknowledge its contents.

Special Inquiry Officer to Respondent: Q. This report from the Federal Bureau of Investigation is made a part of the record as Exhibit #4. Do you understand? A. Yes, sir.

Q. I show you a certified copy of conviction in the case of the Commonwealth vs. Anthony Pino, docket No. 8649, Third District Court of Eastern Middlesex, Cambridge, Massachusetts, consisting of a complaint charging Anthony Pino with larceny; and court docket wherein a plea was originally entered of not guilty and a judgment of guilty was found on December 23, 1948 from which an appeal was taken; and which also contains the entry that on December 28, 1948 appeal was withdrawn by leave of court and on the same day a motion for a new trial was allowed and the finding revoked; on January 4, 1949 there was a judgment of guilty and a sentence of one year in the House

of Correction; appealed on January 10, 1949; January 28, 1949 appeal withdrawn by leave of court and original sentence of one year in the House of Correction suspended; last entry on the docket showing January 30, 1950 sentence revoked and matter placed on file. Does this record relate to you? A. Yes.

By Counsel: This certified copy relates in part to the stealing of twelve golf balls of value less than $100.

(10)

Special Inquiry Officer to Respondent: Q. This document is entered into the record as Exhibit #5. Is this understood by the respondent? A. Yes, sir.

Q. I show you a certified copy of conviction, Docket number 1586 of 1928, Superior Court, Boston, Massachusetts, consisting of an indictment of Anthony Pino and others for abuse of a female child; and court record showing that the indictment was found January 9, 1928; and January 16, 1928, Pino pleaded guilty to said indictment; January 17, 1928, after part of testimony was introduced, said Pino was called in said court and was defaulted; March 15, 1928, said Pino was again tried by a petit jury; March 20, 1928, said jury returned a verdict that said Pino was guilty of said indictment; March 29, 1928, Pino for the crime set forth in the indictment was sentenced to be committed to the Massachusetts Reformatory, Concord, Massachusetts for a term of five years and one day. After examining this document, please advise me if it relates to you? A. Yes.

Q. This document is made a part of the record and marked Exhibit #6. Do you understand? A. Yes.

Q. As you and counsel were previously advised you would be offered a reasonable opportunity to examine the evidence in this case, which consists of Exhibits #5 and #6, it is now made available to you for further examination. A. (By counsel): Thank you, we have examined.

Q. In view of the evidence now at hand, I charge you with being in the United States in violation of Section 241(a)(4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Abuse of a female child; and larceny. Do you understand the nature of the new charge lodged against you? A. Yes, sir.

Special Inquiry Officer to Counsel: Q. Under the existing regulations which flow from the Immigration and Nationality Act, when a new charge is lodged during the course of a proceeding, counsel may request an adjournment for the purpose of preparing his defense on the new charge. A. I so request and, first of all, request your indulgence while I have a conference with my esteemed associate here.

(Recess permitted by Special Inquiry Officer for purpose requested.)

• • •

[Portions of Transcript of Hearing before the Special Inquiry Officer, Dated February 10, 1953, Examination of Anthony Pino (Lawrence F. O'Donnell, Attorney of Record).]

(17)

Counsel: It would be warrantable for counsel to make such a motion and ask that two officers be assigned, one in judgment and one for presenting the evidence.

Special Inquiry Officer: Motion is denied. We shall proceed with the hearing.

• • •

Q. You are requested to advise whether or not this current record from the Federal Bureau of Investigation relates to you? A. Yes.

Counsel: May I examine it?

Special Inquiry Officer: Yes.

(Report examined by both attorneys.)

Special Inquiry Officer: The Federal Bureau of Investigation report, dated January 27, 1953, is entered into the record as Exhibit #4(a).

• • •

[Portions of Transcript of Hearing before the Special Inquiry Officer, Dated February 16, 1953, Examination of Anthony Pino (Lawrence F. O'Donnell, Attorney of Record).]

(30)

Counsel: When I speak about the evidence now, am I to have an opportunity to examine the file, before you for the purpose of presenting the evidence for the Government, other than in capacity as a judge. I would like an opportunity to examine the file.

Special Inquiry Officer: Counsel will not have the opportunity to examine the file. Counsel will have the opportunity to examine the record file, if he desires.

Counsel: Isn't that file in front of you, that you have been referring to constantly, evidence against the respondent?

Special Inquiry Officer: The evidence against the respondent is as was stated, namely, Exhibits #5 and #6 of this proceeding.

Counsel: Well, I would just like to say for the record that the folder referred to by me in the above statement,

on the desk in front of the Special Inquiry Officer in his capacity as prosecutor, is at least two or three inches thick and the exhibits couldn't constitute one-sixteenth of an inch. Therefore, I am without all the evidence because that has been referred to more times than the exhibits.

• • •

(31)

Counsel: It is not up to me. I notice the particular construction of that question, wholly irrelevant in my opinion. I want an opportunity to examine all the evidence that was used and the people that produced it against the respondent, as a result of the warrant of arrest dated January 10th, 1953.

Special Inquiry Officer: I have answered all those questions before.

• • •

[Portions of Transcript of Hearing before the Special Inquiry Officer, Dated March 6, 1953, Examination of Anthony Pino (Paul T. Smith and Manuel Katz, Attorneys of Record).]

(48)

Let the record also show that on March 2, 1953, Associate Counsel Manuel Katz filed a request with the Special Inquiry Officer that subpoenas be issued directing the appearance of the Acting District Director at the hearing, in order that the defense might establish he had no authority to issue the warrant in question; that he could not possibly have determined that a prima facie case of deportation had been established on the grounds contained in the warrant of arrest; that he had no authority to assign the hearing to the Special Inquiry Officer; and that the duties of

the Special Inquiry Officer, assigned to conduct the hearing, include investigations of cases similar to the instant one. Let the record show that under date of March 4, 1953, the Special Inquiry Officer denied the request, stating his reasons therefor.

• • •

(49)

Counsel: May counsel be furnished the application for warrant?

(Application for warrant handed to counsel by Special Inquiry Officer.)

May it be understood before proceeding that the respondent, through counsel, objects and takes exception to the rulings made, dated March 4, 1953, signed by T. J. Geoffrion, Special Inquiry Officer, in response to an application and motion by counsel for the respondent.

Special Inquiry Officer: Exception noted.

• • •

(50)

Counsel: At this point, may counsel for the respondent —Counsel for the respondent demands the production of Ralph J. Doyle, Chief, Investigations Section, who on Exhibit #8 states that he, "Respectfully recommends that a warrant be issued under the authority of the Attorney General."

Special Inquiry Officer: Request denied.

Counsel: Exception.

Counsel: May it be agreed that Ralph J. Doyle, Chief, Investigations Section, is employed by the Department of Justice, Immigration and Naturalization Service and has an office in the building wherein this hearing is being held?

Special Inquiry Officer: It is so agreed.

Counsel: May it be agreed that he would be available, if the Special Inquiry Officer ordered his appearance here?

Special Inquiry Officer: It is so agreed, as far as can be determined at this time.

Counsel: May it be agreed that the denial of the request of counsel is not on the basis that he may be here at this time?

Special Inquiry Officer: That is correct.

(51)

Counsel: May it appear on the record that the basis of the issuance of an application for a warrant was an allegation that the alleged alien had been allegedly convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit: Assault with intent to rape and rape; and larceny.

Special Inquiry Officer: It is so agreed.

Counsel: May it also be agreed that the respondent, Anthony Pino, was at no time convicted of assault with intent to rape and rape?

Special Inquiry Officer: It is so agreed, as far as the record shows.

Counsel: May it be agreed that the records that were available to Ralph J. Doyle, Chief, Investigations Section, did not show any conviction of assault with intent to rape and rape?

Special Inquiry Officer: It will be so agreed.

Counsel: May counsel have Exhibit #4(a)?

(Exhibit #4(a) handed to counsel by Special Inquiry Officer.)

The respondent now moves that Exhibit #4(a), which purports to be an official report of the Federal Bureau of Investigation, be expunged from the record.

Special Inquiry Officer: Motion denied.

Counsel: Exception.

Special Inquiry Officer: Exception noted.

(52)

Counsel: May it be agreed that this Exhibit #4(a) is not being used for the purposes of establishing the alleged conviction of the two crimes involving moral turpitude?

Special Inquiry Officer: It will be agreed that the report of the Federal Bureau of Investigation is not the specific evidence upon which the case rests or upon which a decision may be reached. Exhibit #4(a) has been made a part of the record as cumulative evidence.

Counsel: Respondent objects to that characterization and takes exception thereto.

Special Inquiry Officer: Exception noted.

Counsel: May it be agreed that this is a false statement, in that it alleges that Anthony Pino was convicted on March 29, 1928, of the crime of intent to rape and rape?

Special Inquiry Officer: It is necessary to qualify the answer before entering any agreement, as the report itself states by footnote that the entry referred to is not based on fingerprints in the FBI files. It is reported solely on the basis of data furnished the Bureau concerning individuals of the same or similar names or aliases and is listed only as investigative leads. In that respect, it is agreed that the information may not be accurate.

Counsel: Demand is hereby made for the production of the person or persons who allegedly furnished the data to the Bureau, upon which this report was based, and which recites that Anthony Pino was found guilty of a crime which the Special Inquiry Officer has ruled he has not committed.

Special Inquiry Officer: Demand is denied. That particular crime is not an issue before the Special Inquiry Officer.

• • •

(55)

Counsel: Counsel requests the production of the so-called probation record of Anthony Pino.

(Probation record handed to counsel by Special Inquiry Officer.)

Counsel now moves that Exhibit #3, which purports to be a probation report or a report of the Probation Department of the Commonwealth of Massachusetts, be expunged from the record.

Special Inquiry Officer: Motion denied.

Counsel: Objection and exception.

Special Inquiry Officer: Noted.

Insofar as the counsel has made an objection and an exception, where this has occurred, the objection is overruled and the exception is noted.

Counsel: May it be agreed that as a matter of law the Acting District Director or the Chief Investigating Officer had no basis for issuing a warrant with respect to Anthony Pino, on the grounds that he had been convicted of the crime of rape or attempted rape?

Special Inquiry Officer: It will not be so agreed.

Counsel: Objection and exception.

Special Inquiry Officer: Objection overruled. Exception noted.

Counsel: We now demand again the production of the Assistant District Director so that he may be examined to determine, as a matter of law, he had no basis for issuing such a warrant.

(56)

Special Inquiry Officer: The demand or motion is denied for the reasons set forth in my answer of March 4, 1953, which is part of this record.

• • •

(57)

Counsel: May it be agreed that the Special Inquiry Officer, of his own volition and his own accord, filed new charges against Anthony Pino after the commencement of these proceedings?

Special Inquiry Officer: It is so agreed.

Counsel: May it be agreed that those new charges were filed as the result of the examination of documentary evidence contained in the files relating to prior deportation proceedings against Anthony Pino?

Special Inquiry Officer: It is not so agreed. It is necessary to expand on the answer. The evidence, upon which the additional charge was lodged, was the evidence developed and made a part of this record of hearing.

Counsel: May it be agreed that that evidence, that was developed and made a part of this hearing, was so developed by the Special Inquiry Officer?

Special Inquiry Officer: It is not so agreed. It was presented by the Special Inquiry Officer, as required by the provisions of the McCarran Act.

Counsel: Demand is now made to produce the person who furnished the information to the Special Inquiry Officer, so that he may be interrogated as to the basis of the information furnished to the Special Inquiry Officer.

Special Inquiry Officer: Demand denied.

Counsel: Objection.

Special Inquiry Officer: Objection overruled.

(58)

Counsel: May it appear for the record that the Special Inquiry Officer has before him, and has had before him since the commencement of this hearing, a file which appears to be about 2½ inches thick,

Special Inquiry Officer: It is more 1½ inches thick.

Counsel: which includes many documents and papers and that Special Inquiry Officer has, since the commencement of this proceeding, read through that file.

Special Inquiry Officer: On what does the counsel base that statement?

Counsel: On the evidence as it appeared in the transcript furnished to us by prior counsel.

Special Inquiry Officer: Special Inquiry Officer will agree that he has a file before him. He will agree to nothing else.

Counsel: Will Special Inquiry Officer, at some stage of this proceeding, agree to be interrogated as a witness for the respondent?

Special Inquiry Officer: Special Inquiry Officer will not.

Counsel: Will Special Inquiry Officer agree that prior to the commencement of these proceedings, he examined the file which is before him?

Special Inquiry Officer: To be perfectly honest with counsel, Special Inquiry Officer does not remember whether he did or not. On some cases, he does and on some cases, he does not, depending on the time allotted him for familiarizing himself with the case.

(59)

Counsel: Will Special Inquiry Officer agree that as a result of some time looking through the file, additional charges were filed against Pino in these proceedings?

Special Inquiry Officer: No, Special Inquiry Officer will not so agree for the obvious reason that the development of the hearing itself showed the necessity of lodging the charge.

Counsel: Wait a minute. We are not playing a game here. This man's rights, which involves greater rights than property rights or confinement in a prison, are involved here. Now, I have read through the transcript of the testimony of the hearing and there has been a considerable reluctance on the part of the Government to come forward and state the facts that are involved. Now, the Special Inquiry Officer well knows that he would know whether

during prior hearings in this matter there was any testimony, other than questions put to Pino by yourself or by O'Donnell, and that it was only as the result of questions which you put to Pino that there was a change made in the charges and it follows as a natural logical consequence that you got that information from some other source and if you did get it from another source, you have investigated it yourself or else some one has furnished it to you and I think, in all decency and fairness, you should say you investigated it yourself or who investigated it for you but I think to say it was developed during the course of the hearing would be wholly inconsistent with what developed in the transcript of the testimony and I want to go on record, as counsel for the respondent, in saying that depriving us of the rights of cross-examination of persons, who allegedly or might have investigated this case, is depriving us of opportunity to determine who it was who investigated the alleged grounds for deportation and is wholly inconsistent with any philosophy of constitutional guarantees of jurisprudence in the United States; that as bad as the McCarran Act has been charged with being, it does not contemplate any star chamber proceeding.

Special Inquiry Officer: I will have to stop the further discussion by counsel on that score.

• • •

(60)

Counsel: Now, counsel wishes to present a respondent's motion to quash, or dismiss, these proceedings. There are 24 causes assigned for quashing, canceling, or dismissing these proceedings. I should like to take each one of them up with the Special Inquiry Officer because it is the feeling of the respondent, through counsel, that Special Inquiry Officer will realize and will find that the proceedings should be quashed, after listening to argument. I now file this motion and ask that it be made part of the record.

• • •

(61)

Special Inquiry Officer: With reference to the motion itself, the Special Inquiry Officer denies the motion at this time. I make available to respondent and to counsel copy of letter dated January 19, 1953, addressed to the Assistant Clerk, Third District Court, Middlesex County, Cambridge, Massachusetts, dealing with court record number 8649 (1948) and the answer thereto received from the Assistant Clerk of the court, dated January 29, 1953. This deals in part with the averments contained in paragraph number 20 of the motion.

Counsel: First, may it appear that respondent objects to the ruling of the Special Inquiry Officer denying the motion and takes exception therefrom.

Special Inquiry Officer: The objection is overruled. The exception is noted.

Counsel: Secondly, counsel for the respondent objects to the ruling of the Special Inquiry Officer that he will hear no argument on a motion.

Special Inquiry Officer: Objection is overruled.

Counsel: Exception.

Special Inquiry Officer: Exception is noted.

These two documents are made a part of the record and marked Exhibit #10.

Counsel: I object to that. • • •

• • •

(65)

Counsel: May I have Exhibit #10.

(Exhibit #10 handed counsel by Special Inquiry Officer.)

Demand is hereby made upon Special Inquiry Officer that Paul J. Cronin, Assistant Clerk, Third District Court of Eastern Middlesex, East Cambridge, Massachusetts, be brought in by subpoena.

Special Inquiry Officer: Demand denied.

Counsel: Objection and exception.

Special Inquiry Officer: Overruled and noted.

• • •

(72)

Special Inquiry Officer: The hearing is reconvened.

Counsel: Demand is hereby made upon the Special Inquiry Officer to produce any and all documents, memoranda, notes, or other matters, which were the basis from which the Special Inquiry Officer interrogated the respondent, Anthony Pino, in the prior hearings, so that counsel may examine such matters.

Special Inquiry Officer: The exhibits, which were entered into this record prior to the beginning of this session, are the basis upon which the questioning took place and they are now made available to counsel.

Counsel: May it be agreed that those were the only documents examined by the Special Inquiry Officer for the purpose of interrogating Mr. Pino?

Special Inquiry Officer: No such agreement will be entered into.

Counsel: Objection.

Special Inquiry Officer: Overruled.

Counsel: Exception.

Special Inquiry Officer: Noted.

Counsel: May it be agreed that there might have been other documents that were examined by the Special Inquiry Officer as the basis for his interrogation of Mr. Pino?

(73)

Special Inquiry Officer: No such agreement will be entered into.

Counsel: Objection.

Special Inquiry Officer: Overruled.

Counsel: Exception.

Special Inquiry Officer: Noted.

Counsel: May it be agreed that the file which is before the Special Inquiry Officer, exclusive of the exhibits which

have been entered in this case, was examined by the Special Inquiry Officer as a basis in whole or in part for the examination of the respondent?

Special Inquiry Officer: No agreement thereon will be entered into.

Counsel: Objection.

Special Inquiry Officer: Overruled.

Counsel: Exception.

Special Inquiry Officer: Noted.

Counsel: I now formally make demand that the Special Inquiry Officer be sworn and testify in this proceeding.

(74)

Special Inquiry Officer: Formal request denied.

Counsel: Objection.

Special Inquiry Officer: Overruled.

• • •

(78)

[Anthony Pino, respondent.] Then, from what I understand that there was a box of golf balls that was stolen and they had found them, or something, in Grant's Department Store and they held both of us until court the next morning. Then, I went to court and the case was continued a week, I think, or two and I was found guilty with Mr. Coleman and I had appealed the case because at that time, I had a pardon pending, so in town I went and seen my attorney that was representing me at that time on my pardon, Paul T. Smith, and he told me that there was no need of appealing because it has no bearings on your case, even if you are not guilty.

Counsel: That was on a deportation proceeding. I was not representing you on the pardon.

Respondent: That is right; on the deportation, not on the pardon. So, I withdrew my appeal and then I was granted a new trial and was given one year's suspended sentence, or something, and probation. I accepted this.

• • •

(79)

Counsel: Well, now, I want to digress for one moment. I note, in going over the exhibits, that there is an Exhibit #4 which purports to be a report of the Federal Bureau of Investigation and which was introduced in evidence, prior to our coming into the case, and I move that that exhibit be expunged from the record and give for the same reasons my motion to expunge Exhibit #4(a).

Special Inquiry Officer: Motion denied.

• • •

(83)

Counsel: Let it for the record show that the respondent at this time asks the Special Inquiry Officer if he intends to hear argument on respondent's motion to quash.

(84)

Special Inquiry Officer: Special Inquiry Officer will hear no argument thereon.

• • •

[Letter Dated January 19, 1953, from Henry Nicolls by William F. Wall, U.S. Department of Justice, Immigration and Naturalization Service, to James V. Culhane, Assistant Clerk, Third District Court of Eastern Middlesex.]

E-1356
(WU)
January 19, 1953

Mr. James W. Culhane
Assistant Clerk, Third District Court
Middlesex County
Cambridge, Massachusetts

Dear Mr. Culhane:

In connection with pending deportation proceedings against one Anthony Pino, this office secured from your

Court a copy of the record of the alien's conviction of larceny which is identified as No. 8649 (1948).

This record indicates that the alien was convicted at your court on January 4, 1949, of the offense of larceny and sentenced to a year in the House of Correction from which the alien appealed on January 10, 1949. The following notation then appears on the copy of the court record which is in our possession:

"January 28, 1949 Appeal withdrawn by leave of Court and original sentence one year House of Correction suspended
January 30, 1950 appeal waived
Sentence revoked
On File"

Since this offense is one of those involved in the deportation proceedings it is important that we know the exact disposition of the alien's case on the occasion mentioned above. As the year covered by the suspended sentence had elapsed on January 28, 1950, this office is at a loss to understand why the case was not considered closed on that date. Instead, it appears that further action was taken in the matter on January 30, 1950, and we shall greatly appreciate it if you will furnish us information as to whether there was any motion for new trial or other action taken in this case subsequent to the withdrawal of the appeal on January 28, 1949.

If it is possible for you to furnish us a prompt reply in this matter, it will be helpful to us. I am enclosing for your convenience in replying a self addressed envelope which requires no postage.

Yours very truly

HENRY NICOLLS, District Director
By: WILLIAM F. WALL
Acting Chief, Warrant Unit

Exhibit 10

[Letter Dated January 29, 1953, from Paul J. Cronin, Assistant Clerk of the Third District Court of Eastern Middlesex, to William F. Wall.]

Commonwealth of Massachusetts
Third District Court of Eastern Middlesex
Edward J. Dever
Justice

Special Justices
Robert Walcott
Louis L. Green

Clerk
Charles T. Cavanagh
Ass't. Clerks
Paul J. Cronin
James W. Culhane
Joseph P. Coughlin

January 29, 1953

William F. Wall
U. S. Department of Justice
Boston 8 Massachusetts

Re: Anthony Pino
E-1356(WU)
Court No 8649 of 1948

Dear Mr. Wall:

In reply to your communication as of January 19, 1953, and our telephone conversation subsequent and thereto, please be advised that according to our records the above named Anthony Pino was placed on probation from January 28, 1949 to January 30, 1950 under a sentence of one year in the House of Correction, the execution of which was suspended during his probationary term. Upon Janu-

ary 30, 1950, the court ordered that the sentence of one year be revoked and the case be placed on file.

In further reply to your inquiry, please be informed that the finding of "guilty" still remains and was not revoked, that further, a case placed on file may thereafter be ordered, removed from the files and further considered by the court on the matter of the sentence being re-imposed. I hope this will clear the matter set forth on the certified copy and be assured for any further assistance you may call on me.

Very truly yours,
PAUL J CRONIN
G
Assistant Clerk

pjc/g
Ex 10

[Letter of March 2, 1953, to T. J. Geoffrion from Manuel Katz, Esq.]

March 2, 1953

Mr. T. J. Geoffrion
Special Inquiry Officer
U. S. Dept. of Justice
Immigration & Naturalization Service
73 Tremont Street
Boston 8, Mass.

In re: Anthony Pino—E-1356

Dear Sir:

Request is hereby made for the issuance of the following subpoenas duces tecum in the above matter which has been adjourned for hearing to Friday, March 6th, 1953, at 9:30 a.m.

I

A. Subpoenas duces tecum addressed to the Acting Director who issued the warrant for arrest in the instant case requiring him to produce at the hearing:

1. Any and all documents, papers, letters, regulations, memoranda and records showing his authority to issue the warrant for arrest in question.
2. The application for the warrant of arrest of the respondent.
3. Any and all documents, letters, papers, statements, memoranda and records showing the basis for his determination that a prima facie case for disposition had been established on the ground that the respondent shall "at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a singular scheme or criminal misconduct, to wit: Assault with intent to rape and rape; and larceny".
4. Any and all documents, letters, papers, statements, memoranda and records showing his authority to assign this hearing to the Special Inquiry Officer.
5. Any and all documents, letters, papers, regulations, memoranda and records showing the duties of T. J. Geoffrion in this as well as other cases.

B. The purpose of the request for this subpoena is to establish through the Acting District Director:

1. That he had no authority to issue the warrant in question.
2. That he could not possibly determine that a prima facie case for deportation had been established on the grounds that the respondent "at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a sin-

gular scheme or criminal misconduct, to wit: Assault with intent to rape and rape; and larceny".

3. That he had no authority to assign this hearing to the Special Inquiry Officer.
4. That the duties of the Special Inquiry Officer assigned to conduct this hearing include investigations of cases similar to the instant case.

II

A. Subpoena duces tecum addressed to the Investigating Officer applying for the warrant of arrest in question requiring him to produce at the hearing any and all documents, papers, letters, statements, memoranda and records showing the basis upon which he determined that a prima facie case for deportation of the respondent existed on the grounds that the respondent "at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a singular scheme or criminal misconduct, to wit: Assault with intent to rape and rape; and larceny".

B. The purpose of the request for this subpoena is to establish through the Investigating Officer:

1. That he could not possibly determine that a prima facie case for deportation had been established on the grounds that the respondent "at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a singular scheme or criminal misconduct, to wit: Assault with intent to rape and rape; and larceny".

Respectfully submitted,

MANUEL KATZ

Attorney for Respondent,

Anthony Pino

MK:d

[Decision by T. J. Geoffrion, Special Inquiry Officer, Dated March 4, 1953, re Application for Subpoenas.]

U. S. Department of Justice
Immigration and Naturalization Service
73 Tremont Street
Boston 8, Massachusetts

File: E-1356 Boston — March 4, 1953

In re: Anthony Pino

In Deportation Proceedings

In Behalf of Respondent: Manuel Katz, Attorney at law, (Associate Counsel) 209 Washington Street, Boston, Mass.

Application: Request for subpoenas to be addressed to the Acting District Director and to the Investigating Officer who applied for warrant of arrest.

Discussion: This is a request, addressed to the undersigned under date of March 2, 1953, seeking to have:

(a) The Acting District Director produce at hearing:

1. Documents, papers, letters, regulations, memoranda and records showing authority to issue warrant of arrest;
2. Application for warrant of arrest;
3. Documents, letters, papers, statements, memoranda, et cetera, showing basis for determination that a prima facie case had been established that the respondent had been convicted, after entry, of two crimes involving moral turpitude, et cetera, to wit: Assault with intent to rape and rape; and larceny;
4. Documents, letters, records, et cetera, showing authority to assign hearing to the Special Inquiry Officer;

5. Documents, letters, papers, regulations, et cetera, showing the duties of the undersigned in this case, as well as other cases; and

(b) The Investigating Officer applying for warrant of arrest to produce at hearing any and all documents, papers, statements, et cetera, upon which he determined that a prima facie case for deportation existed, on the grounds that the respondent, after entry, had been convicted of two crimes involving moral turpitude, et cetera: Assault with intent to rape and rape; and larceny.

Counsel for the respondent alleges that the Acting District Director had no authority to issue the warrant in question; that it could not be possibly determined that the respondent was deportable on the charges listed: Assault with intent to rape and rape; and larceny; that he had no authority to assign this hearing to the Special Inquiry Officer; and, finally, that the duties of the Special Inquiry Officer assigned to conduct this hearing includes investigations of cases similar to the instant case.

Counsel contends further that the Investigating Officer applying for the warrant of arrest could not possibly determine that a prima facie case for deportation had been established on the grounds that the respondent had been convicted of two crimes involving moral turpitude, after entry: Assault with intent to rape and rape; and larceny.

Counsel prays that these two persons, with their respective records, be produced at hearing so that these facts can be established and Special Inquiry Officer has given this request careful consideration.

Counsel is referred to the law, namely, the Immigration and Nationality Act, which became effective December 24, 1952, and to the Immigration and Naturalization Regulations which have been published on December 19, 1952, as

Title 8, Code of Federal Regulations. Both the law and the regulations are available to the public. There is contained therein the full authority concerning the issuance of immigration warrants of arrest, the authority to assign hearings to Special Inquiry Officers, and the limitations which are placed on the activities and duties of Special Inquiry Officers.

Counsel may, on request during the hearing, be shown the authority and certificate of appointment under which the Special Inquiry Officer operates.

There is on file an acknowledgment dated February 26, 1953 from the associate counsel, who has made this request, that he has received a transcript of previous hearings granted in this proceeding during the course of which the counsel of record was advised of the basis on which the warrant of arrest was issued. Counsel at time of next hearing may, if he so desires, request that the application for warrant of arrest be presented for his scrutiny and this can be made available to him.

The issue in the hearing, of which counsel has a transcript, is solely whether the respondent is subject to deportation on the charge lodged at hearing as supported by certified copies of conviction, which were entered into evidence as Exhibits #5 and #6. The lodging of an additional charge during the course of hearing is based on the legal authority contained in Section 242.53(d), Title 8, Code of Federal Regulations. It is not fatal to the issue of deportability if there is a deficiency in the warrant of arrest, providing that sufficient affirmative evidence is presented to sustain a deportation charge (Toku Sakai v. U.S., 239 Fed. 492 (CCA 9, 1917). Failure to issue new warrant on added charge against alien is cured where alien is summonsed before officer and notified of additional charge against him and is given full opportunity to be heard thereon. U.S. ex rel. Boric v. Marshall, D.C. Pa. 1933, 4 F. Supp.

965, appeal dismissed CCA 1933, 67 F. 2d 1920, certiorari granted, 1933, 54 S. Ct 345, 290 U.S. 623, 78 L. Ed. 543, certiorari dismissed, 1935, 54 S. Ct. 371, 290 U.S. 709, 78 L. Ed. 609.

DECISION: The request for the issuance of subpoenas requiring the attendance of the Acting District Director and of the Investigating Officer applying for the warrant of arrest in this case, is denied.

T J GEOFFRION
T. J. GEOFFRION
Special Inquiry Officer

[Massachusetts Record Introduced by Special Inquiry Officer.]

PINO, TONEY 500 · Born No. 5 Day 10 Yr. 1907

NAME
1. Pano, Toney
2. Pino, Antonio
3. Pino, Anthony

ADDRESS
a. 579 Dorchester Ave.
b. 33 Kennebec St., Mattapan
c. 58 Port Norfolk, Neponset
d. 3 Fuller St., Dorchester

BIRTHPLACE	HT.	WT.	COMP.	H. or W.
Italy	5/7	210	Med.	

OCCUPA.
Counterman Restaurant Owner
Chauffeur Truckman
Grocer-Messenger

PARENTS
1. Frank 3.Cath. Arena
2. Kate Irenna 4. Catherine

DATE	OFFENCE	COURT	DISPOSITION
Mar. 31,1923	Obstructing Traffic	South Boston	Filed
May 20,1925	Unlawful appropriation auto	Boston Municipal	6 mos.House Correction suspended sentence 5-21-26
May 28,1926	No license	Dorchester	6-7 Filed
July 15, 1926	Not slowing down	West Roxbury	$15 suspended sentence7-29-26
April 15,1927	Speeding	Roxbury	$10 paid
Aug. 4, 1927	Restricted Street	Boston Municipal	$5
Nov. 15,1927	Burglar Tools	Roxbury	Bound Over
Nov. 25,1927	Abuse of Female Child	Boston Municipal	12-9 Grand Jury
Dec. 12,1927	Possessing Burglar Tools	Suffolk Superior	No Bill
Dec. 21,1927	Speeding	Roxbury	$15 committed
Mar. 29,1928	Abuse Female Child	Suffolk Superior	Massachusetts Reformatory 5 years 1 day
Oct. 29,1930	Paroled 3-29-33	Massachusetts Reformatory (Concord)	Gavin
Nov. 10,1931	Suspicious Person	Fall River	11-12 11-18 11-27 Dismissed
Nov. 11,1931	Attempted breaking & entering	Fall River	11-18 11-27 Dismissed
Sept. 3,1932	Metropolitan District Com.rules	Dorchester	Filed
Jan. 16,1933	Accessory before fact Breaking and Entering, day time	Boston Municipal	1-24 1-31 Probable cause
June 21,1933	Not slowing down	East Boston	$5 paid
June 18,1934	Speeding	Taunton	$5 paid
Jan. 6,1936	Conspiracy to break and enter	Boston Municipal	1-16 1-31 Probable cause
Jan. 16,1936	Alien possessing firearms	Boston Municipal	1-31 Discharged
Jan. 17,1936	Fugitive from N.H. Robbery	Boston Municipal	1-23 2-28 Default
Jan. 29,1936	Speeding	Worcester	$10 paid
Feb. 13,1936	Conspiracy to break and enter	Suffolk Superior	No bill
Mar. 4,1936	Default removed 1-17-36	Boston Municipal	3-26 Default
Apr. 3,1936	Default recived	Boston Municipal	4-11 4-17 5-4 5-18 5-25 Discharged
Feb. 18,1937	Conspiracy to steal	South Boston	2-25 3-11 3-16 Grand Jury
Apr. 13, 1937	Conspiracy	Suffolk Superior	No Bill
Nov. 27,1937	Possessing Burglar Tools	Boston Municipal	12-8 Dismissed Want of Prosecution Indicted
Jan. 6,1938	Breaking & Entering Building Day time with intent to steal	Suffolk Superior	3-4 years State Prison-Indicted
Jan. 6,1938	Conspiracy to break and enter	Suffolk Superior	On file after sentence-Indicted
Jan. 6,1938	Possessing Burglar Implements	Suffolk Superior	3-4 years State Prison from and after-Indicted

EXHIBIT #3.

CLOSE IN CENTER

PENO, Toney
PINO, Antonio
PINO, Anthony

DATE		COURT	DISPOSITION
Sept. 12,1944	Paroled 1-5-46	State Prison	(Charlestown
July 12,1946	Speeding	Dorchester	$5.00
Dec. 3,1948	Larceny	Cambridge	12-23 12-24 1 year House of Correction-Appealed
Jan. 28,1949	Appeal Withdrawn 12-8	Cambridge	1 year House of Correction Suspended Sentence 1-30-50 f
Sept. 6,1949	Full and complete pardon by Governor and Council two cases of 1-6-38 (Breaking and entering daytime to commit a felony and possessing burglar tools).		
July 5,1950	Violation fish and game law	Barnstable	$10 paid

EXHIBIT #3.

COPY BOUND CL

A-45

[FEDERAL BUREAU OF INVESTIGATION REPORT INTRODUCED BY SPECIAL INQUIRY OFFICER.]

...N EDGAR HOOVER

Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

Form No. 9

538482

Jan 27 1949 3760

...T, N.W.

The following is the record of FBI number 169 123

J. Edgar Hoover
Director.

EDE
10/25/48

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
...ice Department, ...ton, ...achusetts	Anthony Pino #21139	November 15, 1927	Suspicious Person (General)	
	November 15, 1927, Boston, Massachusetts, as Anthony Pino, #21139, Suspicious Person Burglar's tools; bound over December 12, 1927, Supreme Court, no bill.			
...te Reformatory ...cord Junction, ...achusetts	Anthony Pino #25011	March 30, 1928	Carnal Abuse	5 years and 1 day *Paroled October 29, 193
...ice Department, ...L River, ...achusetts	Anthony Pino #3035	November 10, 1931	Attempt to break and enter and larceny night time	*November, 27t dismissed
...ice Department, ...ton, ...achusetts	January, 4, 1936, Suspicious Person, Anthony Pino #39894	Boston, Massachusetts, Police, Murder January 4, 1936	Suspicious Person Robbery, Armed	
...ice Department, ...erville, ...achusetts	November 2, 1936, As Anthony Pino. Anthony Pino #--	Boston, Massachusetts, Police, #39894, November 2, 1936	State Penitentiary, Suspicion of larceny	Larceny Released on waiver.
...te Penitentiary, ...rlestown, ...achusetts	Anthony Pino #20573	January 6, 1938	Breaking, Entering, intent to commit felony (day) having in possession burglar implements	3-4 years 3-4 years from and after September 11 1944 released

*Represents notations unsupported by fingerprints in FBI files.

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EXHIBIT #4

P.X. 4.

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JOHN EDGAR HOOVER

Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

The following is the record of FBI number 169 123

J. Edgar Hoover
Director

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Alien Registration Division, United States Immigration and Naturalization Service, Philadelphia, Pennsylvania.	Anthony Pino. #2136979	Alien Registration March 28, 1941		
United States Immigration and Naturalization Service, Boston Massachusetts	Anthony Pino #538/482-A-2136979	December 6, 1941	Violation of Immigration Laws	Pending Deportatio
Police Department, Arlington, Massachusetts	Anthony Pino #1495	not given (print received December 20, 1948	larceny (less than $100.00)	
Police Department, Waltham, Massachusetts	Anthony Pino #--	December 23, 1948	receiving stolen property	not guilty

* Represents notation unsupported by fingerprints in FBI files.

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JOHN EDGAR HOOVER

Federal Bureau of Investigation,
United States Department of Justice
Washington, D. C.

Form T-8

The following is the record of FBI number 169 123

J. E. Hoover
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION

Suffolk School, Breaking and entering; [illegible] on print #25011
October 25, 1915, South Boston, Massachusetts, stealing ride car; on file.
September, 30, 1916, South Boston, Massachusetts, stealing ride car; on file.
October 14, 1916, South Boston, Massachusetts, Breaking and entering and larceny, (2); file.
October 14, 1916, South Boston, Massachusetts, Breaking and entering and larceny, probation January 13, 1917, filed.
January 4, 1918, South Boston, Massachusetts, playing ball in street; on file.
June 1, 1918, South Boston, Massachusetts, playing ball in street; filed.
August 15, 1918, Roxbury, Massachusetts, Larceny; probation August 14, 1919.
August 17, 1918, South Boston, Massahhusetts, stealing ride, probation.
October 25, 1918, South Boston, Massachusetts, larceny, Suffolk School.
November 25, 1921, Roxbury, Massachusetts, larceny, December 1, Lyman School, suspended sentence.
August 12, 1922, South Boston, Massachusetts, breaking and entering; probation November 11, 1922; November 20th filed.
March 31, 1923, South Boston, Massachusetts, obstruction traffic; on file.
May 20, 1925, Boston, Massachusetts, use without auto; 6 months House of Correction, suspended May 21, 1926.
May 28, 1926, Dorchester, Massachusetts, no license; June 7th, filed.
July 15, 1926, West Roxbury, Massachusetts, M.S.P.; $15.0 sentence suspended, July 29, 1926.
April 15, 1927, Roxbury, Massachusetts, speeding, $10.00 paid.
August 4, 1927, Boston, Massachusetts, restricted street; $5 00 paid.
November 25, 1927, Boston, Massachusetts, abuse of female child; December Grand Jury.
December 21, 1927, Roxbury, Massachusetts, speeding, $15.00 committed.
September 3, 1932, Dorchester, Massachusetts, M.D.C., filed

*Represents notations unsupported by fingerprints in FBI files.

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JOHN EDGAR HOOVER

Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

The following is the record of FBI number 169 123

J. Edgar Hoover
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
			January 11, 1933, Boston, Massachusetts, as Anthony Pino, #30994, suspicious person, breaking windows.	
			January 16, 1933, Central, Boston, Massachusetts, Breaking and entering daytime, 2 years House of Correction, appealed (December 4, 1933 not guilty)	
			January 16, 1933, Central Court, Boston, Massachusetts Accessory before the fact and breaking and entering, probable cause.	
			night.	
			June 3, 1933, Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, Breaking and entering, night.	
			June 21, 1933, East Boston, Massachusetts, Police not slowing down, $5.00 paid.	
			May 4, 1934, Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, robbery armed.	
			June 18, 1934, Taunton, Massachusetts, Speeding, $5.00, paid.	
			January 23, 1935, Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, Robbery armed, released.	
			February 13, 1935, Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, breaking and entering.	
			March 9, 1935, Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, breaking and entering, store; released.	
			March 11, 1935, Boston, Massachusetts, Police, as Anthony Pino #30994, Suspicious Person, safe job, released.	
			January 15, 1936, Boston, Massachusetts, Police, as Anthony Pino, #39894, Suspicious Person, robbery armed.	
			February 13, 1936, Boston, Massachusetts, Police, as Anthony Pino, #BR-2587, Suspicious Person, robbery armed.	
			October 9, 1936, Boston, Massachusetts, Police, as Anthony Pino, #39894, Suspicious Person, armed robbery.	

* Represents notations unsupported by fingerprints in FBI files.

NOTICE: THIS RECORD IS FURNISHED FOR OFFICIAL USE ONLY

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JOHN EDGAR HOOVER

Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

Form 74

The following is the record of FBI number 169 123

J. Edgar Hoover
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
	As Anthony Pino, #1495, Massachusetts, December 6, 1948; on December 8, 1948 case was continued to December 13, 1948.	Police Department, Arlington,	larceny (less than $100.00);	
	As Anthony Pino, #1495, Massachusetts, December 6, 1948 (from persons unknown); on December 8, 1948 continued to December 13, 1948.	Police Department, Arlington,	larceny (over $100.00	

*Represents notation corresponding to fingerprints in FBI files.

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A-50

[Federal Bureau of Investigation Report Introduced by Special Inquiry Officer.]

RECEIVED
JAN 30 1953
Office of the District Director
U. S. Immigration & Naturalization
Boston, Mass.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

1-27-53 ph

J. Edgar Hoover
Director

169 123

The following FBI record, NUMBER , is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Police Department, Boston, Massachusetts	Anthony Pino #21139	November 15, 1927	Suspicious Person (General)	November 15, 1927, Boston, Massachusetts, as Anthony Pino, #21139, Suspicious Person, Burglar's tools; bound over December 12, 1927, Supreme Court, no bill
State Reformatory, Concord Junction, Massachusetts	Anthony Pino #25011	March 30, 1928	Carnal Abuse	5 years and 1 day *Paroled October 29, 19
Police Department, Fall River, Massachusetts	Anthony Pino #3035	November 10, 1931	Attempt to break and enter and larceny night time	*November 27 dismissed.
Police Department, Boston, Massachusetts	January 4, 1936, Suspicious Person, Anthony Pino #39894	Boston, Massachusetts, Police, Murder. January 4, 1936	Suspicious Person Robbery, Armed	
Police Department, Somerville, Massachusetts	November 2, 1936, as Anthony Pino, Anthony Pino #--	Boston, Massachusetts, Police, #39894, November 2, 1936	State Penitentiary, Larceny Suspicion of larceny	released on waiver.
State Penitentiary, Charlestown, Massachusetts	Anthony Pino #20573	January 8, 1938	Breaking, Entering, intent to commit felony (day) having in possession burglar implements	3-4 years 3-4 years from and after September 18 1944, released

Ex. 44

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

Exhibit #(a)

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UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

1-4

J. Edgar Hoover
Director

169 123

The following FBI record, NUMBER . is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
lien Registration ivision, United tates Immigration d Naturalization ervice, hiladelphia, ennsylvania.	Anthony Pino. #2136979	Alien Registration March 28, 1941		
nited States migration and aturalization ervice, Boston assachusetts	Anthony Pino #536/482-A-2136979	December 6, 1941	Violation of Immigration Laws	Pending Deportation.
olice Department, rlington, assachusetts	Anthony Pino #1495	not given (print received December 20, 1948	larceny (less than $100.00)	
olice Department, altham, assachusetts	Anthony Pino #--	December 23, 1948	receiving stolen property	not guilty
United States Immigration and Naturalization Service (duplicate print	Anthony Pino #E-1356 Boston Massachusetts returned-enclosure)	January 10, 1953	violation Immigration Laws	pending

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

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U. S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

J. Edgar Hoover
Director.

169 123

The following FBI record, NUMBER , is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION

Suffolk School, Breaking and entering.(as on print #250
October 23, 1915, South Boston, Massachusetts, stealing ride car; on file.
September, 30, 1916, South Boston, Massachusetts, stealing ride car; on file.
October 14, 1916, South Boston, Massachusetts, Breaking and entering and larceny, (2); file.
October 14, 1916, South Boston, Massachusetts, Breaking and entering and Larceny, probation January 13, 1917, filed.
January 1, 1918, South Boston, Massachusetts, playing ball in street; on file.
June 1, 1918, South Boston, Massachusetts, playing ball in street, filed.
August 15, 1918, Roxbury, Massachusetts, Larceny; probation August 14, 1919.
August 17, 1918, South Boston, Massachusetts, stealing ride, probation.
October 25, 1918, South Boston, Massachusetts, larceny, Suffolk School.
November 25, 1921, Roxbury, Massachusetts, larceny,
December 1, Lyman School, suspended sentence.
August 12, 1922, South Boston, Massachusetts, breaking and entering; probation November 11, 1922; November 20th filed.
March 31, 1923, South Boston, Massachusetts, obstruction traffic; on file.
May 20, 1925, Boston, Massachusetts, use without auto; 6 months House of Correction, suspended May 21, 1926.
May 28, 1926, Dorchester, Massachusetts, no license; June 7th, filed.
July 15, 1926, West Roxbury, Massachusetts, N.S.D.; $15. sentence suspended, July 29, 1926.
April 15, 1927, Roxbury, Massachusetts, speeding, $10.00 paid.
August 4, 1927, Boston, Massachusetts, restricted street; $5.00 paid.
November 25, 1927, Boston, Massachusetts, abuse of femal child; December Grand Jury.
December 21, 1927, Roxbury, Massachusetts, speeding, $15.00 committed.
September 3, 1933, Dorchester, Massachusetts, M.D.C., filed

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

COPY BOUND C

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

J. Edgar Hoover
Director.

169 123

The following FBI record, NUMBER , is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
			January 13, 1933, Boston, Massachusetts, as Anthony Pino, #30994, suspicious person, breaking windows.	
			January 16, 1933, Central, Boston, Massachusetts, Breaking and entering daytime, 2 years House of Correction, appealed (December 4, 1933 not guilty)	
			January 16, 1933, Central Court, Boston, Massachusetts, Accessory before the fact and breaking and entering, probable cause.	
			night.	
			June 3, 1933 Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, Breaking and entering, night.	
			June 21, 1933, East Boston, Massachusetts, Police not slowing down, $5.00 paid.	
			May 4, 1934, Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, robbery armed.	
			June 18, 1934, Taunton, Massachusetts, Speeding, $5.00, paid.	
			January 28, 1935, Boston, Massachusetts, Police, as Anthony Pino, #0994, Suspicious Person, Robbery armed, released.	
			February 13, 1935, Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, breaking and entering.	
			March 9, 1935, Boston, Massachusetts, Police, as Anthony Pino, #30994 Suspicious Person, breaking and entering, store: released.	
			March 11, 1935, Boston, Massachusetts, Police, as Anthony Pino #30994, Suspicious Person, safe job, released.	
			January 16, 1936, Boston, Massachusetts, Police, as Anthony Pino, #30894, Suspicious Person, robbery armed.	
			February 13, 1936, Boston, Massachusetts, Police, as Anthony Pino, #BR-2587 Suspicious Person, robbery armed.	
			October 9, 1936, Boston, Massachusetts, Police, as Anthony Pino, #30894 Suspicious Person, armed robbery.	

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

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UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

J. Edgar Hoover
Director

The following FBI record, NUMBER 169 123, is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
	As Anthony Pino, #1495,		Police Department, Arlington, Massachusetts, December 8, 1948, larceny (less than $100.00); on December 8, 1948 case was continued to December 23, 1948.	
	As Anthony Pino, #1495,		Police Department, Arlington, Massachusetts, December 8, 1948 larceny (over $100.00 from persons unknown); on December 8, 1948 continued to December 23, 1948.	
	Anthony Pino #1586-1928		Suff Superior Court Boston March 29, 1928 intent rape and rape; found guilty 5 years 1 day Massachusetts Reformatory	
	Anthony Pino #8649-1948		Cambridge Massachusetts 3rd District Court December 8, 1948 larceny; 1 year House of Correction approximately January 28, 1949 suspended sentence January 30, 1950 filed.	

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

COPY BOUND C

FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

Record from 145 INS Address 73 Tremont St., Boston, Mass.
(Do the above line please state whether Police Department, Sheriff's Office, or County Jail)

Date of arrest 1-10-53
Charge Violation immig. laws
Disposition of case pending
Residence 1 Fuller St., Dorchester
Place of birth Sicily, Italy
Nationality Italian
Criminal specialty ooo noja

(PLEASE PASTE PHOTO HERE)

Your no. 169 123 for criminal record

F. B. I. NO. 169 123

Age 46 Date of birth 5/10/06
Height 5'7" Comp. med. Hair black
Weight Eyes brown Build
Race and scars tattoo of eagle with word "Liberty" on right forearm and on left forearm tattoo of head with dagger.

CRIMINAL HISTORY

NAME	NUMBER	CITY OR INSTITUTION	DATE	CHARGE	DISPOSITION OR SENTENCE
ANTHONY PIKO	1586-1928	Suff Sup Court Boston	2-29-28	Int Rape & Rape(Viola Wilfo)	Found Guilty 5yrs 1 day Mass Reformatory
" "	8649-1948	Cambridge Mass Mun.Court	12-8-48	Larceny	1 Yr HC app; 1-28-49 Susp Sent 1/30/50 Filed.

ACCOMPLICES

NAME	NUMBER	NAME	NUMBER	NAME	NUMBER

(Please furnish all additional criminal history and police record on reverse sheet)

RECORDED
JAN 13 1953

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[Record of Third District Court of Eastern Middlesex.]

Commonwealth of Massachusetts.

MIDDLESEX, TO WIT:

To the Third District Court of Eastern Middlesex, holden at Cambridge for the Transaction of Criminal Business, within the County of Middlesex,

William M. Germain

of ~~Cambridge~~ Arlington in said County, in behalf of the Commonwealth of Massachusetts, on the eighth day of December in the year of our Lord one thousand nine hundred and forty-eight on oath complains that Anthony Pino

did steal twelve golf balls

of the value of less than one hundred dollars of the property of

R. W. Shattuck Co. Inc.

William M. Germain

MIDDLESEX, ss. Received and sworn to, on said day, before said Court.

James W. Culhane *Assistant Clerk.*
Pro tem

Form G.F. 21 11-52-500

A True Copy of Complaint
Attest: James W. Culhane
Assistant Clerk

P. 5

EXHIBIT #5.

MIDDLESEX, ss. CAMBRIDGE, December 8, 1950 ...

By virtue of the Statute, the within named defendant was arrested by me without a warrant.

William M. Germain
Police Officer of Cambridge
Arlington

A True Copy of Complaint
Assistant Clerk

ARLINGTON

1948 No. 8619

COMMONWEALTH

vs.

Anthony .ino

LARCENY
G. L. Ch. 266, Sect. 30

Bailed $1000 Real Estate
(S. December 8, 1948
W.

Plea. -Not Guilty
December 23,1948
Judgment-Guilty
1 year House of Correction
Appeal December 27, 1948 $1000
recognized Bailed Surety Company
Bond.
Dec. 28, 1948 Appeal withdrawn
by leave of Court
December 28, 1948 Motion for new
trial filed and allowed Continued
for retrial-Finding revoked
January 4, 1949
Judgment-Guilty
1 year House of Correction
Appeal January 10, 1949 $50
recognized cash January 4, 1949

January 28, 1949 Appeal withdrawn
by leave of Court and original sentence
1 year House of Correction suspended
January 30, 1950 appeal waived
Sentence revoked on file.

[Record of Superior Court for Suffolk County.]

No. 1586 of 1928

Commonwealth of Massachusetts

Suffolk, to wit:

At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of March in the year of our Lord one thousand nine hundred and twenty-eight.

The Honorable Harold P. Williams, a Justice of said Court presiding

Commonwealth of Massachusetts.

Suffolk, ss. At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of January in the year of our Lord one thousand nine hundred and twenty-eight.

The Jurors for the Commonwealth of Massachusetts, on their oath present that

Anthony Pino, Bernice Saxton and Mary Grigas

on the seventeenth day of November in the year of our Lord one thousand nine hundred and twenty-seven in and upon one Viola Willis a female child under the age of sixteen years, did make an assault, with the intent her, the said Viola Willis unlawfully and carnally to know and abuse; and her the said Viola Willis then and there did unlawfully and carnally know and abuse.

A true bill.

Joseph A. Flynn

Foreman of the Grand Jury.

Frederick T. Doyle

Assistant District Attorney.

January 9, 1928. Returned into said Superior Court by the Grand Jurors, and ordered to be filed.

Attest:

JOHN P. MANNING
Clerk.

Record

January 9, 1928. Indictment was found and returned into said Superior Court by the Grand Jurors.

January 16, 1928. Pino pleaded not guilty to said indictment. Thereupon said Pino was set at the bar for trial. A jury was impanelled and sworn to try the issue.

January 17, 1928. After part of the testimony was introduced, said Pino was called in said Court and was defaulted. Thereupon said issue was withdrawn from said jury.

March 15, 1928. Said Pino was again tried by a petit jury.

March 20, 1928. Said jury returned a verdict that said Pino was guilty of said indictment.

March 29, 1928. It was considered by said Court that said Pino, for his crime as set forth in said indictment, be committed to the Massachusetts Reformatory at Concord, in said Commonwealth, there to be kept and governed according to the rules of the same for the term of five years and one day and that he stand committed until he be removed in pursuance of said sentence.

I hereby certify that the foregoing is a true copy of the record of said Superior Court in said case.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Superior Court, at Boston aforesaid, this sixth day of January, in the year of our Lord one thousand nine hundred and fifty-three.

WILLIAM M. PRENDIBLE
Clerk.

[Seal]

[Decision and Order of October 26, 1950, re Deportation of Anthony Pino.]

United States Department of Justice
Immigration and Naturalization Service

Oct 26 1950
(No Appeal)

File: A-2136979—Boston (538-482)

In re: Anthony Pino or Frank Gurno

In deportation proceedings

In behalf of respondent: Manuel Katz, Esquire
209 Washington Street
Boston, Massachusetts

Charges:

Warrant: Act of 1917—Sentenced more than once subsequent to entry for crimes, to wit: Breaking and entering with intent to commit a felony; and Abuse of a female child.

Lodged: Act of 1917—Sentenced more than once for conviction in this country of crimes after entry, to wit: Abuse of a female child; and possession of burglarious implements with intent to employ and use in order to steal money or other property.

Application: Cancellation of warrant of arrest

Detention status: Released under bond

Discussion: The record relates to a 43-year-old married male, native and citizen of Italy, whose last and only entry into the United States was at the port of Boston, Massachusetts on May 25, 1908. A warrant of arrest was issued on April 20, 1938 under the provisions of the Immigration Act of 1917, in that he had been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the commission subsequent to entry

of a crime involving moral turpitude, to wit: Breaking and entering with intent to commit a felony; and abuse of a female child.

The respondent was indicted for the abuse of a female child at Boston, Massachusetts on January 9, 1928, and was convicted on March 20, 1928 and sentenced to the Massachusetts Reformatory at Concord, Massachusetts for a term of five years and one day. The respondent was indicted with others for breaking and entering a building with intent to commit a felony therein, at Boston, Massachusetts on December 7, 1937. He pled guilty to the indictment on January 6, 1938 and was sentenced to a term of not more than four and not less than three years at State Prison, Boston, Massachusetts. The respondent was also indicted with others in Boston, Massachusetts on December 7, 1937 for having in his possession certain burglary tools. He pleaded guilty to said indictment and was sentenced in the Superior Court, for Suffolk County at Boston, Massachusetts on January 6, 1938 for a term of not more than four and not less than three years, this sentence to take effect after the expiration of his sentence for breaking and entering.

On January 5, 1949, the hearing was reopened in order that an additional criminal charge could be lodged in that under the Immigration Act of February 5, 1917 he was subject to deportation in that he had been sentenced to imprisonment for a term of one year or more because of conviction in this country of crimes involving moral turpitude committed after entry, to wit: Abuse of a female child; and possession of burglarious implements with intent to use and employ in order to steal money and other property. This conviction was made a part of the record as shown by Exhibit 6. There was also entered into the hearing as Ex-

hibit 12 a certified copy of court record showing that respondent was convicted on December 23, 1948 for the crime of larceny and sentenced to one year in the House of Correction. The court record further shows that on withdrawal of his appeal, the original sentence of one year in the House of Correction was suspended. Although respondent was sentenced to imprisonment for a term of one year or more on his larceny conviction, the sentence was suspended. It has been held that a completely suspended sentence is not a sentence under the immigration laws where imprisonment as a result of such conviction does not follow. *U. S. ex rel. Robinson v. Day,* (C.C.A. NY. 1931), 51 F. 2d. 1022.).

There has also been entered into the record as Exhibit 9 Certified Copy of Pardon furnished under date of September 21, 1949 by the Chairman of the Advisory Board of Pardons for Massachusetts, showing that on September 6, 1949 the respondent was fully and completely pardoned for the crimes of (1) Breaking and entering in the day time to commit a felony; (2) having burglarious tools for which he was convicted in the Suffolk County Superior Court at Boston, Massachusetts during January 1938 and sentenced to three and four years and three and four years from and after. In view of this pardon the charge in the warrant of arrest as well as the lodged charge are not sustained.

The warrant of arrest will be canceled.

ORDER: It is ordered that the warrant of arrest dated April 20, 1938, be canceled, and the proceedings terminated.

A. C DEVANEY
Assistant Commissioner
Adjudications Division

[DECISION AND ORDER OF SPECIAL INQUIRY OFFICER DATED MARCH 23, 1953.]

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Boston 8, Massachusetts

File: E-1356 Boston March 23, 1953

In re: ANTHONY PINO

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Paul T. Smith, Attorney of record, Manuel Katz, Associate counsel, 209 Washington Street, Boston, Mass.

CHARGES:

Warrant: Immigration and Nationality Act—Convicted of two crimes, after entry, not arising out of a single scheme of criminal misconduct: Assault with intent to rape and rape; and larceny.

Lodged: Immigration and Nationality Act—Convicted of two crimes, after entry, not arising out of a single scheme of criminal misconduct: Abuse of a female child; and larceny.

APPLICATION: None

DETENTION STATUS: Released on bond

WARRANT OF ARREST SERVED: January 10, 1953

DISCUSSION: This record relates to a 45 year old married male, a native and citizen of Italy, whose only entry into the United States occurred at the port of Boston, Massachusetts, ex SS Romanic, on May 25, 1908, when he was admitted for permanent residence. That entry has been verified.

On January 9, 1928, the respondent was indicted by a Grand Jury of Suffolk County, Boston, Massachusetts charging him with abuse of a female child and, after enter-

ing a plea of not guilty, was found guilty as indicted in the Superior Court, Boston, Massachusetts, on March 20, 1928, and sentenced on March 29, 1928, to be committed in the Massachusetts Reformatory, at Concord, Massachusetts for a term of five years and one day. A certified copy of this conviction was presented to the respondent and he identified it as relating to him (Exhibit #6).

The respondent was convicted of the crime of larceny of a dozen golf balls, in the District Court of Cambridge, Massachusetts, on January 4, 1949, and sentenced to one year in the House of Correction. Sentence was suspended. On January 30, 1950, the court revoked the sentence and the case was placed on file. A certified copy of the court record in this matter was identified by the respondent as relating to him (Exhibit #5). The last-mentioned court record (Exhibit #5) shows that the respondent was tried under Section 30 of Chapter 266 of the General Laws of Massachusetts, which reads:

> "Whoever steals, or with intent to defraud, obtains by a false pretense, or whoever unlawfully and, with intent to steal or embezzle, converts or secretes, with intent to convert, the money or personal chattel of another, whether such money or personal chattel is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the value of the property stolen exceeds one hundred dollars, be punished by imprisonment in the state prison for not more than five years or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen does not exceed one hundred dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars; or, if the property was stolen from the convey-

ance of a common carrier or of a person carrying on an express business, shall be punished for the first offense by imprisonment for not less than six months nor more than two and a half years, or both, or by a fine of not less than fifty dollars nor more than six hundred dollars, or both, and for a subsequent offence by imprisonment for not less than eighteen months nor more than two and a half years, or by a fine of not less than one hundred and fifty nor more than six hundred dollars or both."

Under this section of law, the value of the property is material only for the purpose of fixing the punishment. Larceny has always been held to involve moral turpitude. U. S. ex rel Rizzio v. Kenney (D.C. Conn. 1931) 50 F. (2d) 418; 2, I. & N. 201, *Matter of N—*; 2, I. & N. 530, *Matter of M—*.

It is contended that because of revocation of sentence and of the subsequent filing of the case, there was no conviction in this matter of larceny. It is argued that the case is not at rest, in that, it may again be brought before the appropriate court and the respondent sentenced anew. Thereafter, the respondent would have his usual right of appeal. This view is untenable. On the question as to whether conviction as used in the statute means a legal determination of the guilt of the accused by his own plea or final judgment pronounced against him, Bouvier says that the former undoubtedly represents the accurate meaning of the term, and includes an ascertainment of a party's guilt by verdict of a jury as well as by his own confession. He adds, "It is said to be sometimes used to denote final judgment." Blackstone uses the word exclusively in the former sense. "Conviction" may accrue in two ways, either by his confessing the offense and pleading guilty or by his being found so by the verdict of his country.

The Massachusetts courts have held that the filing of a case, after a finding of guilt, constitutes a conviction: 179-108 Mass., Munkley v. Commonwealth; Commonwealth v. Lockwood—109 Mass. 323. In this latter case, there is found a definition of conviction, judgment and sentence in the following comment: "The ordinary legal meaning of 'conviction' when used to designate the particular stage of a criminal prosecution tried by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury which ascertains and publishes the fact of his guilt—while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequence to the convict of fact thus ascertained." The same interpretation follows in a trial without jury, that a court must make the finding as to whether the person charged is or is not guilty. The United States District Court, at Boston, in an unreported decision in the matter of Salvatore De Matreo, a petitioner for naturalization, held that a finding of guilt by a jury of conspiring wilfully and maliciously to burn a building, after which the indictment was filed by the court, was a conviction. The United States District Court, at Providence, Rhode Island, in an unreported decision in the matter of Joseph Packowitz alias Joseph Peck, a petitioner for naturalization, held that a finding of guilt on a charge of lewd and lascivious cohabitation, after which the case was filed, was a conviction.

In reference to the respondent's conviction for abuse of a female child, on March 29, 1928, the indictment which is part of Exhibit #6 charges that the respondent on, ". . . a female child under the age of sixteen, did make an assault, with intent unlawfully and carnally to know and abuse; and her the said . . . then and there did unlawfully and carnally know and abuse.", on November 17, 1927. It has been held that carnal abuse of a minor child is a crime

involving moral turpitude. 2, I. & N. 121 (footnote: *Matter of D—*, A-2174218 decided 3-25-44); also, 2, I. & N. 610, *Matter of F—*, decided June 7, 1946, wherein it is held that contributing to the delinquency of a child by encouraging her to be guilty of indecent and lascivious conduct, such acts being of the nature commonly called statutory rape, involves moral turpitude.

The convictions, which form the basis for this proceeding and the acts connected therewith, occurred approximately twenty years apart and therefore it is established that they did not arise out of a single scheme of criminal misconduct. The charge lodged at the hearing is sustained.

It is contended by the respondent that the Immigration and Nationality Act is an ex post facto law and that it is therefore unconstitutional. The Special Inquiry Officer may not decide on that question for the reason that such a function of passing on the constitutionality of a statute enacted by Congress flows to the judicial branch of the Government. Panitz v. District of Columbia, 112 F. (2d) 39, 42 (C.A.,D.C.,1940); Todd v. Securities and Exchange Commission, 137 F. (2d) 475, 478 (C.A. 6, 1943). However, constitutionality of previous immigration laws, which were retrospective in their application, have been tested and held not to be unconstitutional. Harisiades v. Shaughnessy, 342 U.S. 580; Carlson et al v. Landon, 342 U.S. 524. That it was the deliberate intent of Congress to make the present Act retrospective in its application is established by Section 241(d) of the Act, which reads: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to

any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

Respondent formally requested that the Special Inquiry Officer subpoena the Chief, Investigations Section and the Acting District Director requiring them to produce their records, in order that their authority might be questioned to apply for and issue the warrant of arrest on the particular charges contained therein. The request was denied. At hearing, the respondent specifically denied having been convicted of the crime of: Assault with intent to rape and rape; a crime with which he was charged with being convicted in the warrant of arrest. However, there was lodged at hearing, in accordance with the authority contained in Section 242.53 (d), Title 8 CFR, an additional or other charge, that he is subject to deportation under the provisions of the Immigration and Nationality Act, in that, he has been convicted after entry of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Abuse of a female child; and larceny; which is supported by the evidence of record; and consequently, the presence of the officers was unnecessary. The possible irregularity in the warrant of arrest is overcome where the alien is notified of the new charge against him and is given full opportunity to be heard thereon, even though a new warrant of arrest is not issued. U.S. ex Boric v. Marshall, D.C. Pa. 1933, 4 F. Supp. 965, appeal dismissed, C.C.A. 1933, 67 F. 2d 1020, certiorari granted, 1933, 54 S. Ct. 345, 290 U.S. 623, 78 L. Ed. 543, certiorari dismissed, 1935, 54 S. Ct. 371, 290 U.S. 709, 78 L. Ed. 609. Furthermore, even if present, a deficiency in the warrant of arrest will not alone nullify the entire proceedings where sufficient affirmative evidence has been presented to sustain a deportation charge. Toku Sakai v. U.S., 239 Fed. 492 (C.C.A. 9, 1917); Int. Dec. No. 330, decided by the Board of Immigration Appeals June 22, 1951.

Counsel on several occasions requested that the file before the Special Inquiry Officer be made available to him. This was denied. The transcript of hearings, and the exhibits made a part of the record, constitute the only evidence considered by the Special Inquiry Officer in this case and copies of this material are available to counsel.

It has been charged, during the course of the hearing, that the Special Inquiry Officer has acted arbitrarily, unreasonably, and wholly inconsistent with the philosophy of a fair hearing and with the legal and constitutional requirements of due process. A review of the record shows that the respondent was advised of the charge in the warrant of arrest, was represented by counsel, was questioned as to alienage and to facts of entry, which he readily admitted against interest. He was presented with certified copies of convictions covering two separate and distinct crimes, which he readily admitted as relating to him. There was lodged against him at hearing an additional charge, as provided by regulations, and the evidence in support thereof was made known to him. Thereafter, in conformity with regulation, he was granted adjournment to prepare a defense on the new charge. The record shows tnat hearing was initiated January 28, 1953 and adjourned to February 10, 1953, after the lodging of a charge at hearing, to afford counsel time to prepare a defense. Consecutive sessions of the hearing were held February 10, 1953 and February 16, 1953 and were each adjourned on motion of counsel. A last adjournment was granted on February 16, 1953 by the Special Inquiry Officer, on motion of counsel, to February 27, 1953. After that, administratively, a postponement was granted to March 6, 1953 because of a change in counsel. The hearing was concluded on March 6, 1953.

The record shows that the respondent on a previous occasion had been under deportation proceedings which

had been terminated as a result of a full and complete pardon issued by the Governor of the Commonwealth of Massachusetts, on September 6, 1949, for the crimes of: Breaking and entering in the daytime, to commit a felony; and having burglarious tools; for which he had been convicted in Superior Court, Boston, Massachusetts, in January 1938. The respondent claims that the crimes, of which he is charged in this proceeding, were considered in the previous hearing. As the respondent stated he was unable to specify the charges against him, either in the warrant of arrest relating to the previous hearing or any lodged charge therein, there was made a part of this record the final order terminating the previous proceeding. The record now before me shows that in previous hearings in deportation proceedings, the respondent was charged with being deportable under the Act of 1917 because he was sentenced more than once subsequent to entry for crimes, to wit: Breaking and entering, with intent to commit a felony; and abuse of a female child; on the basis of a warrant of arrest dated April 20, 1938. There were various hearings granted in that proceeding from 1941 to 1949 during which there was lodged the charge, under the Immigration Act of 1917, that he was sentenced more than once for conviction in this country of crimes after entry, to wit: Abuse of a female child; and possession of burglarious implements with intent to employ and use in order to steal money or other property. Of the crimes which supported the charges in the previous proceeding, only one, namely: Abuse of a female child; is in issue before us in this proceeding. The others were wiped out by the executive pardon previously mentioned.

As a matter of fact, under the Immigration Act of 1917, the respondent was not deportable for his conviction for larceny in 1949 for the reason that the sentence of one year was totally suspended at that time. The present Immigra-

tion and Nationality Act now reaches the respondent on a crime for which he was heretofore not deportable. Thus, under Section 241(a)(4) of the present Act, it is not material that a twice-convicted alien be sentenced to imprisonment to fall within its scope, as it plainly states that he shall be deportable for conviction of two crimes after entry, ". . . regardless of whether confined therefor . . .".

Under examination by counsel, the respondent stated that he might have been born in the United States. Under redirect examination by Special Inquiry Officer, the respondent testified that he had never said he was born, but that he may have been born here. Thereafter, he stated that to the best of his knowledge, he was born in the United States. Originally and initially in this hearing, the respondent had freely and against interest admitted he is a native and citizen of Italy and had come to the United States in 1908, accompanied by his mother. He identified his record of entry as an alien. His alienage is therefore established. His testimony that he may have been or was probably born in the United States comes somewhat belatedly, is self-serving, and not at all convincing. No credence to this late claim of United States citizenship is given by the Special Inquiry Officer.

It is the contention of counsel that the Special Inquiry Officer investigated the case, in that, he reviewed it prior to hearing. It is immaterial whether or not this was done. If it was reviewed, it was solely for the purpose of determining the evidence to be developed and the material to be introduced at the hearing and for no other purpose.

The respondent is married to a citizen of the United States, whom he supports, and has no children. He gives as his occupation, dealer in second-hand and new furniture; and operating a parking lot. His father and mother are residents of the United States and he has two sisters and a brother born in this country. Counsel objected to ques-

tions relating to the respondent's assets. Further inquiry was not made on that score. Exhibit #5 shows that the larceny, of which the respondent was convicted on January 4, 1949, was committed on December 8, 1948. The respondent cannot establish good moral character for the last five years and consequently cannot establish statutory eligibility for any relief from deportation.

The respondent refused to name a country to which he desired to be sent, in the event he is ordered deported.

FINDINGS OF FACT: Upon the basis of the evidence in the case, it is found:

(1) That the respondent is an alien, a native and citizen of Italy;

(2) That the respondent's only entry into the United States occurred at the port of Boston, Massachusetts, ex SS Romanic, on May 25, 1908, in the company of his mother, when he was admitted for permanent residence;

(3) That the respondent was convicted in Superior Court, Boston, Massachusetts, on March 20, 1928, after a plea of not guilty, on an indictment charging him with abuse of a female child, and sentenced on March 29, 1928 to a term of five years and one day in the Massachusetts Reformatory;

(4) That the respondent was convicted, as charged, on a complaint of larceny, in District Court, Cambridge, Massachusetts, on January 4, 1949, and sentenced to one year in the House of Correction, sentence suspended; sentence revoked on January 30, 1950 and the case thereupon placed on file.

CONCLUSIONS OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Section 241(a)(4) of the Immigration and Nationality Act, the respondent is subject to de-

portation on the ground that, he at any time after entry has been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Abuse of a female child; and larceny;

(2) That under Section 241(a)(4) of the Immigration and Nationality Act, the respondent is not subject to deportation on the ground that, he at any time after entry has been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Assault with intent to rape and rape; and larceny.

ORDER: It is ordered that the alien be deported from the United States in the manner provided by law on the lodged charge only.

T J GEOFFRION
T. J. Geoffrion
Special Inquiry Officer

[LETTER DATED JUNE 4, 1953, BY PAUL J. CRONIN, ASSISTANT CLERK, THIRD DISTRICT COURT OF EASTERN MIDDLESEX, TO WILLIAM F. WALL.]

William F. Wall
United States Department of Justice
Immigration and Naturalization Service
73 Tremont Street
Boston 8, Massachusetts

June 4, 1953

Re. Anthony Pino
E-1356 (WU)
Court No. 8649 of 1948

Dear Mr. Wall:

It appears that some question has arisen in reference to my communication to you in reply to your letter asking for

clarification of the entries in this court on the above entitled matter.

At the request of Paul T. Smith, Esq. of Boston I am writing this in addition, in an effort to clarify the question of a defendant's right if his case is removed from the files. It appears that since the original sentence is revoked, if a new sentence be imposed the defendant would thereupon have the right of appeal to the Superior Court, from the new sentence, if so imposed. If the original plea entered by the defendant in a case was "not guilty" upon an appeal the matter is thereupon certified to the Superior Court for trial de novo. I enclose herewith copy of communication from Paul T. Smith.

Very truly yours,
PAUL J. CRONIN
Ass't. Clerk
PAUL J. CRONIN

PJC/W
CC to Paul T. Smith
A true copy:

[Decision of Board of Immigration Appeals dated August 11, 1953.]

E-1356—Boston

Anthony Pino

In deportation proceedings

In Behalf of Respondent:
Paul T. Smith, Esq.
Manuel Katz, Esq.
Reuben Goodman, Esq.
209 Washington Street
Boston, Massachusetts
(Heard June 5, 1953)

(Sidney B. Rawitz, Esq., Representative of the Immigration & Naturalization Service also heard)

CHARGES:

Warrant: Immigration & Nationality Act—convicted of two crimes, after entry, not arising out of a single scheme of criminal misconduct: Assault with intent to rape and rape; and larceny

Lodged: Immigration and Nationality Act—convicted of two crimes, after entry, not arising out of a single scheme of criminal misconduct: Abuse of female child; and larceny

APPLICATION: Cancellation of warrant of arrest and termination of proceedings

DETENTION STATUS: Released on bond

Warrant of Arrest served January 10, 1953

This is an appeal from a decision of the Special Inquiry Officer dated March 23, 1953, directing the deportation of the respondent on the charge lodged at the hearing.

The case is concerned with a 58-year-old married male alien who was born at Divieto, Messina, Italy on May 7, 1907. He was admitted to the United States on May 25, 1908 for permanent residence. He was then one year old and was accompanied by his mother. He has maintained a residence in the United States since that time.

The record shows that the respondent was arrested on December 8, 1948 and a complaint filed against him in the Third District Court of Eastern Middlesex, Cambridge, Middlesex County, Massachusetts, charging him with stealing 12 golf balls; that he entered a plea of not guilty but was found guilty on December 23, 1948 and sentenced to one year in the House of Correction; appeal was taken on December 27, 1948, but on December 28, 1948 the appeal was withdrawn by leave of court and a motion for a new trial was filed and allowed continued for new trial. On January 4, 1949 he was found guilty, sentenced to one year in the House of Correction and appealed on January 10,

1949; on January 28, 1949 appeal withdrawn by leave of court and sentence suspended; on January 30, 1950 appeal was waived, sentence revoked, and the case placed on file (Ex. 5). The record further shows that on January 9, 1928, respondent was indicted by a Grand Jury of Suffolk County, Boston, Massachusetts, charging him with abuse of a female child and, after entering a plea of not guilty, was found guilty, as indicated, on March 20, 1928, and sentenced on March 29, 1928, to be committed in the Reformatory, Concord, Massachusetts for a term of five years and one day (Ex. 6). The foregoing evidence consists of certified copies of court records which have been identified as relating to the respondent [1].

The first contention of counsel is that Pino is not deportable because he has not been "convicted" of the crime of larceny of 12 golf balls. That is, it is counsel's argument that the action of the court in this case in placing it on file precludes us from finding that there has been a "conviction," within the purview of the immigration laws, because the placing of a case on file does not, under the laws of Massachusetts, constitute a "conviction" [2].

Prescinding momentarily from the immediate issue, however, the Supreme Judicial Court of Massachusetts has repeatedly enunciated the essential character of that feature of the Commonwealth's Criminal Procedure here being considered. It has long been a common practice in that state, after a verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause,

[1] For lengthy criminal record relating to respondent, see Appendix

[2] Counsel has pointed out that this primary problem must be determined by applying the law of the state where the crime was committed (*U. S. v. Smith*, 41 F 2d 707), here, Massachusetts.

public justice does not require an immediate sentence, to order, with the consent of the defendant and the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute (Sts. 1865, c. 223, 1869, c. 415, s. 60; cf. also c. 218, s. 38 and c. 219, s. 8—Gen. Laws Massachusetts, Ter. Ed. 1933). Such an order is not equivalent to a final judgment, or to a nolle prosequi or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein (*Commonwealth v. Dowdican's Bail,* 115 Mass. 123). The case then stands on the records of the court, and although usually no further proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it (*Marks v. Wentworth,* 199 Mass. 44). There has been merely a suspension of active proceedings in the case, and as yet no final disposition (*Commonwealth v. Carver,* 224 Mass. 42)[3].

The question of the proper interpretation to be given the words "final conviction" or "finally convicted" is not free from difficulty (Fifth Report of Judicial Council of Mass., 1929; 15 MQ (2) 31). It is quite clear to us, however, that the term "conviction" is used in at least two different senses in the Massachusetts Statutes. And it

[3] While the decisions herein cited are not necessary to support our decision, it is of interest to note that the Supreme Judicial Court of Mass. has at least intimated that the "placing of a case on file" may be the same as suspension of sentence (*King v. Commonwealth,* 246 Mass. 57), and probation (*Finer v. Commonwealth,* 250 Mass. 493).

appears to be well settled that in its ordinary legal sense the word "conviction", as used in those statutes, signifies that the defendant has pleaded guilty, or has been found guilty by the verdict of a jury. The exhaustive opinion of Chief Justice Gray (*Commonwealth v. Lockwood,* 109 Mass. 323), leaves no doubt that such was the meaning of the word "conviction," not only in the common law, but as it was used in the Constitution, and, for the most part, in the Statutes of the Commonwealth of Massachusetts (Public Sts., c. 200, s. 5; Gen. Laws, Ter. Ed., c. 263, s. 6—1933). In some statutes, however, the word is used as implying the judgment and sentence of the court upon a verdict or confession of guilt. For example, the provisions of the statutes (Pub. Sts., c. 169, s. 19; Gen. Laws, c. 233, s. 21), that the conviction of a witness of a crime may be shown to affect his credibility, has been held to be limited to cases where final judgment has been entered upon the verdict (*Commonwealth v. Gorham,* 99 Mass. 420)[4]. So also in the case of the plea of autre fois convict (*Commonwealth v. Lockwood,* 109 Mass. 323, 329). These and other cases in which the word "conviction" is used in a more comprehensive sense as implying a judgment may be regarded, however, as exceptions to the general rule (1 Op. Att'y. Gen. 499, 500).

In *Munkley v. Hoyt,* 179 Mass., 108 where it was provided in St. 1896, c. 397, s. 9, that the Board of Registration in Pharmacy, after hearing, might suspend the registration and certificate of a registered pharmacist, or might revoke such registration and certificate altogether, but which contained the provision that "the license or certificate of registration of a registered pharmacist shall not be suspended

[4] In 1950 this section was amended so that, under certain circumstances, a plea or verdict of guilty in a felony case constitutes a conviction within the meaning of the statute (*Forcier v. Hopkins,* 53 A.S. 95, Jan. 8, 1953; 110 F. 2d 126)

or revoked for a cause punishable by law until after conviction by a court of competent jurisdiction," the court held that the placing of a case on file after a plea of guilty was a sufficient conviction to warrant the suspension or revocation of the license. Whereas, in the case of *Commonwealth v. Kiley*, 150 Mass. 325, where the statute (St. 1887, c. 392) provided that the conviction of a person licensed to sell intoxicating liquors shall of itself make the license void, the court held that a verdict of guilty was not a "conviction" within the meaning of the statute (See also, *Commonwealth v. Gorham*, 99 Mass. 420; *Fay v. Harlan*, 128 Mass. 244).

The distinction between the cases of *Munkley v. Hoyt* and *Commonwealth v. Kiley* (*supra*), and other similar decisions, appears to rest upon the fact that in the latter the conviction itself voids or revokes the license so that the loss of the license in effect becomes a part of the sentence rather than a consequence of the verdict or finding of guilty, while in the former case the determination of the guilt of the license did no more than confer jurisdiction upon an independent tribunal to proceed with a separate inquiry resulting in the revocation or suspension of the license (3 Op. Att'y. Gen. 572).

Counsel also contend, with regard to the question of "conviction," that Pino's case is still pending in the District Court, can be called up for sentence at any time on motion of either party [5], and that if a new sentence is imposed Pino will have an appeal to the Superior Court where, it is alleged [6], he will be given a trial de novo. The

[5] At page 3 of Supplemental Brief, it is indicated that Pino filed a motion for a new trial on February 4, 1953, and that on February 14, 1953 decision on the motion was reserved.

[6] Letter of June 4, 1953 from Assistant Clerk of District Court, furnished by counsel, supplementing letter of January 29, 1953, to Boston Office of the Service.

For citations of cases paralleling *Munkley v. Hoyt & Comm. v. Kiley* decisions see Appendix.

argument is then advanced that if we hold that there has been a "conviction" here, Pino may well be deported and thereafter found not guilty by the Superior Court.

While we do not wish to question the accuracy of the information contained in the letter of the Assistant Clerk of the District Court (*, supra), the contents thereof are not entirely clear to us in the light of the facts of this case and the law of Massachusetts. In the case of *Renado v. Lummus*, 205 Mass. 155, the court held:—"A right of appeal in a criminal case in a police, district or municipal court is given only to one who has been *convicted, and the appeal is only from the sentence,* which corresponds to the judgment of the court in civil actions." (Underscoring supplied) In any event, the contingency forseen by counsel can be forestalled administratively by a request for stay of deportation (8 C.F.R. 243.3(b)).

Summarizing briefly, we have exhaustively examined the cases cited by counsel for the alien and the Service, and we have carefully considered the able arguments presented by them. It is clear to us that in its ordinary legal sense the word "conviction," under the law of Massachusetts, means merely that a defendant in a criminal case has pleaded guilty or has been found guilty by a verdict of a jury or finding of a court. That is precisely the situation we find with regard to Pino. It is the policy of this Board to give to the word "conviction" its ordinary legal interpretation, for purposes of the immigration laws. We have pointed out that the exceptions to the general rule in Massachusetts wherein a sentence is required before there has been a "conviction," occur where an additional penalty flows automatically from the imposition of sentence and in effect becomes a part thereof, rather than a consequence flowing therefrom. Here, the determination of Pino's guilt of the crime of stealing golf-balls, plus the

crime hereinafter to be discussed, did no more than confer jurisdiction upon an independent tribunal, the Special Inquiry Officer, to proceed with a separate inquiry resulting in the order of deportation, here being appealed. Finally, we have pointed out that even if Pino is successful in obtaining a trial de novo in the Superior Court, whereby the finding of guilt by the District Court might be set aside, he has available an administrative remedy to defer deportation pending such a decision.

On the basis of the foregoing, and as this record now stands, it is clear to us that Pino has been "convicted" of the larceny of twelve golf balls, within the purview of the Immigration and Nationality Act.

It is so well recognized as to obviate further discussion that the crime of larceny, whether grand or petty, involves moral turpitude. B.I.A. (56158) 494, July 5, 1944; *Tillinghast v. Edmund*, 31 F 2d 81; *Blumen v. Haff*, 78 F 2d 833. However, the second substantive argument advanced in this case is that the crime of abuse of a female child, of which Pino was convicted in 1928 (Par. 3, Exh. 6, supra), does not involve moral turpitude.

The crime conviction we are now considering was had under an indictment charging that Pino assaulting a female child under the age of 16 years, with the intent to unlawfully and carnally know and abuse her, and that he did unlawfully and carnally know and abuse her, and that Pino was found guilty as indicted, and there is no question but that his conviction was for violation of Section 23 of Chapter 265 of the General Laws of Massachusetts[7]. It is

[7] Section 23, Chapter 265, Gen. Laws of Mass. reads as follows:— "Whoever unlawfully and carnally knows and abuses a female child under sixteen shall be punished by imprisonment in the State prison for life or for any term of years, or, except as otherwise provided, for any term in any other penal institution in the Commonwealth."

urged that under said Section a person may be convicted even though he did not know the girl was under age; that the crime requires no force, knowledge, or intent; that the crime Pino committed was merely fornication; that mere fornication even with a girl under sixteen does not involve moral turpitude; and that it is difficult to realize how fornication with a girl of 15 years, 11-1/2 months, of mature body and mind, who voluntarily and perhaps for profit submits, can be considered as base, vile and depraved. Finally, in this connection, it is urged that under Massachusetts Law the crime of abuse of a female child does not necessarily involve moral turpitude.

The contention of counsel with respect to this crime are completely without merit. In the first place, this Board has previously held that carnal abuse of a minor child involves moral turpitude (*Matter of P—*, 2I&N Dec. 117, 121—Footnote 16; *Matter of R—*, 3 I&N Dec. 562, 564). Secondly, it has been judicially determined that the crime involves moral turpitude (*Bendel v. Nagle*, 17 F 2d 719; *Ng Sin Wing v. United States*, 46 F 2d 755, 756). In the first decision cited, the court, in passing on a Maryland Statute on the subject, stated:—"The crime of which the appellant was convicted is usually classed as rape, the statute simply raising the common-law age of consent, and such a crime manifestly involves moral turpitude." In the other case cited, the court merely adopted the former, without comment. Finally, in this connection, there is no question but that the crime involves moral turpitude, under the law of Massachusetts. In the case of *Commonwealth v. Hackett*, 170 Mass. 194, the court left no doubt that the crime of having carnal connection with a girl under 16 years is rape, even if she gives full consent (Cf. also, *Commonwealth v. Sugland*, 4 Gray 7). Again, in the case of *Commonwealth v. Murphy*, 165 Mass. 66, the court stated that consent is no excuse (Cf. also, *Commonwealth v. Roosnell*, 143 Mass. 32),

and classified this crime "as one of the most heinous crimes that can be committed." The court also therein pointed out that it would make no difference if the female child were 15 years and 11 months of age and answered the argument re: fornication, adversely to counsel, by this language:—"It is a familiar rule that, if one intentionally commits a crime, he is responsible for the consequences of his act if the offense proves to be different from that which he intended."

It is next contended that Pino is not deportable under Section 241(a)(4) of the Immigration and Nationality Act [8] on the basis of his convictions of the two crimes specified in the charge lodged at the hearing, because said Section requires that the alien be sentenced for such crimes. We need not consider the question of whether the placing of a case on file after a verdict of guilty amounts to a sentence, because this contention is obviously without merit. It is clear that the argument is directed to the second clause of Subsection 4 of Section 241(a) of said Act. It is equally clear that that portion thereof does not require sentencing to render Pino deportable. The language of the law is clear and unambiguous, and it is readily apparent that it lucidly expresses the intent of Congress. The legislative history of this Act leaves no room for doubt in the matter and renders it obvious that an alien twice convicted of crimes involving moral turpitude after entry is deportable

[8] That Section reads as follows:—"Section 241,(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

regardless of whether or not he has been sentenced therefor. The language used to express the Congressional intent is as follows:—

> "Thus, an alien who at any time after entry is convicted of two crimes involving moral turpitude, is deportable, regardless of whether confined therefor, whereas under existing law the alien must have been sentenced to a term of a year or more because of such convictions" (House Report 1137, 82nd Cong., 2nd Session, p. 21: Report of the Committee on the Judiciary pursuant to Senate Resolution 137, Senate Report 1515, 81st Cong., 2nd Session, p. 392).

Counsel further urges the proposition that Section 241(a)(4) of the Immigration and Nationality Act (*, supra) applies specifically to crimes committed and convictions obtained after the effective date of the Act. That is, it is contended that the language thereof discloses an unmistakable intent on the part of Congress to have that clause applied prospectively only. We, however, reject this argument categorically. Section 19(a) of the Immigration Act of February 5, 1917, as amended, referring to the deportability of aliens on the basis of more than one conviction of a crime involving moral turpitude, stated, "or who is *hereafter* sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." (underscoring supplied) Section 38 of that Act provided that the provisions thereof were to take effect on or after May 1, 1917. Section 241(a)(4) does not contain the equivalent prospective language which was contained in Sections 19 and 38 of the Act of February 5, 1917, as amended. The foregoing, to us at least, reflects a material change in the law which substitution, since Congress is presumed to have been aware of the construction of terms

in the 1917 Act, clearly indicates that the former phraseology did not correspond with the legislative intent and that a different interpretation should be given to the new wording.

Also, the word "hereafter" appears in Section 241(a)(3) of the Immigration and Nationality Act. Had Congress intended to give Section 241(a)(4) thereof prospective application only, it would have been a simple matter to have inserted the same word therein. Moreover, Section 241(d)[9] brings Pino within the class of aliens deportable under 241(a)(4). Section 241(d) expresses unmistakably the intent of Congress to make 241(a)(4) retroactive. There is nothing therein to show only a prospective intent on the part of Congress with regard thereto.

It is further contended that, should we rule, as in fact we have, that the provisions of Section 241(a)(4) of the Immigration and Nationality Act were intended to operate retrospectively, there are ample constitutional reasons to prevent the fulfillment of such intent. That is, it is urged that the Act is constitutionally objectionable because it makes deportable for the first time and without any forewarning aliens such as Pino who before the passage of the Act could not have been deported. In other words, the argument is that the Act is unconstitutional as an ex post facto law. In the first place, during all the years since 1917 Congress has maintained an admonition to aliens that their conviction of more than one crime involving moral turpitude may subject them to deportation at any time. Hence,

[9] Section 241(d) reads thusly:—"Except as otherwise specifically provided in this Section, the provisions of this Section shall be applicable to all aliens belonging to any of the classes enumerated in Subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of the enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in Subsection (a), occurred prior to the date of the enactment of this Act."

Pino was not caught unawares and there appears to be no ground to the contention that he was not adequately forewarned both that his conduct was prohibited and of its possible consequences. Secondly, the ex post factor clause of the Constitution applies only to criminal proceedings (*Calder v. Bull*, 3 U. S. 386, 390; *Johannessen v. U. S.* 225 U. S. 227, 242), and deportation is not a criminal proceeding (*Bugajewitz v. Adams*, 228 U. S. 585, 591; *Carlson v. Landon*, 342 U. S. 524, 537). The precise contention here made has been unqualifiedly rejected (*Mahler v. Eby*, 264 U. S. 32; *Harisiades v. Shaughnesey*, 342 U. S. 580, is to the same effect).

Exception has also been taken to Pino's deportability on the "unconstitutional for vagueness" argument, in connection with the crimes specified in the lodged charge. It appears to us that argument in this respect has been foreclosed (*Jordan* v. *De George*, 341 U. S. 223), as well as by the cases hereinbefore cited by us (pp. 5 & 6, supra). Hence, further discussion of this point is unnecessary.

Another argument advanced is that the warrant of arrest should be cancelled and this proceeding terminated, for the reason that the doctrine of res judicata is here applicable. This contention is based on the fact that the Assistant Commissioner, Adjudications Division, Immigration and Naturalization Service, in a decision dated October 26, 1950 (Ex. 11), ordered cancellation of the warrant of arrest dated April 20, 1938 and termination of the proceedings. It is alleged that examination of that decision demonstrates that both of the crimes which are the basis for the present proceeding were therein considered; that, as a result, Pino had the status of an alien who could not be deported on account of those two crimes; and that, by virtue of Section 405(a) of the Immigration and Nationality Act, such status continues in force and effect. In the first place, in

the prior proceedings deportability was urged on only one criminal ground common to the present basis for deportation, viz—abuse of a female child. Secondly, the decision of the Assistant Commissioner was based on the fact that the effect of the other crime there involved was wiped out by a pardon. Hence, the facts do not support the present contention. Third, it is well established that administrative decisions of the Executive Department of this Government cannot constitute res judicata (*Pearson v. Williams,* 202 U. S. 281). Finally, in this connection, counsel has not cited any specific language in Section 405 (a) on which reliance has been placed. Our examination of that section does not disclose any specific provision thereof particularly applicable to Pino's case, and we believe that Section 241(d) (°, supra), constitutes a mandate from Congress necessitating the institution of deportation proceedings de novo against Pino, using as one of the elements of the charge a crime which served as one of the elements on which a prior deportation proceeding was based.

We are next called upon to consider certain alleged procedural deficiencies which, according to counsel, constitute ample reasons for cancellation of the outstanding warrant of arrest and termination of this proceeding. By way of outline, they are as follows:—

(1) There were a number of irregularities in connection with the issuance of the warrant of arrest;
(2) There was a denial of opportunity to prepare, in contravention of the basic concepts of fair play guaranteed by the Constitution and intended by the Act and Regulations;
(3) There was a commingling of investigative, prosecutive and judicial functions to an extent prohibited by the Act and falling far short of constitutional standards of impartiality;

(4) There was a denial of opportunity to explain or rebut hearsay evidence in violation of the Regulations and constitutional due process;
(5) There was a denial of opportunity to argue, in violation of the Act, Regulations and the Constitution.

The first irregularity charged in connection with the issuance of the warrant of arrest is that the application therefor specified that Pino had been convicted of two crimes involving moral turpitude, to wit: Assault with intent to rape and rape, and larceny. It is argued that Pino had never been convicted of "assault with intent to rape and rape;" that there was nothing in the Service files indicating the possibility of such a conviction. Therefore, the Service Officer applying for the warrant of arrest could not have determined that a prima facie case for deportation had been established on which to base the application; and that, by the same token, the Service Official had no authority to issue the warrant. However, the record shows that the application was supported by certified copies of the court records showing Pino's conviction of carnal abuse of a female child and larceny. We have previously pointed out that the former conviction is nothing other than one for rape (*Commonwealth v. Hackett*, 170 Mass. 194), albeit statutory. Hence, it is clear that the conduct specified in the application for the warrant of arrest and the warrant itself arose out of the same conduct for which Pino was convicted. Thus, it is clear to us that the argument regarding lack of a prima facie case of deportability is without merit. In addition, assuming but not conceding that there was an irregularity in the proceedings in this respect, it has been well settled in a long line of cases under the immigration laws that irregularities or deficiencies in the issuance of a warrant of arrest do not invalidate later proceedings where sufficient grounds for deportation have

been established and the hearing is not shown to have been unfair (*Bilokunsky v. Todd,* 263 U.S. 149; *Chan Shee v. Nagle,* 9 F 2d 342; *Matter of C—.,* A-7416925, B.I.A., June 22, 1951, Int. Dec. 330). This record definitely demonstrates that Pino's deportability has been established, and the question of a fair hearing will be hereinafter tested fully.

The second allegation of irregularity in the issuance of the warrant of arrest is based on the claim that the Service Official who issued it was not one of the officials specifically authorized to do so. 8 C. F. R. 242.13 provides that any officer mentioned in 8 C. F. R. 241.1(a) who receives an application for a warrant of arrest may issue same if he determines that a prima facie case for deportability has been established. (That question was treated in the paragraph immediately preceding) Section 242.1(a) also provides that a warrant of arrest may be issued by District Directors and other enumerated officers. Section 1.1(a)(8) of the regulations defines District Director as including the officer or employee of the Service who has been designated as the District Director in the absence of the District Director. This record indicates that the Service Official here was properly so designated. No evidence to the contrary has been submitted. Also, it is so well a recognized principle of law as to obviate further discussion that there is a presumption which accords regularity to the acts of Government Officials.

We find that the contention that Pino has been denied opportunity to adequately prepare his defense is without foundation in fact. One of the reasons advanced was that time was needed by counsel to acquire familiarity with the Immigration and Nationality Act. The fact remains that these proceedings were instituted in January 1953. While it is true that the Act did not become effective until December 24, 1952, it was enacted on June 27, 1952. Hence, it had

been in the books for approximately six months and was not exactly an entirely new piece of legislation. The warrant was served on January 10, 1953 and the first hearing scheduled for January 28, 1953, a notice of more than two weeks. At that first hearing a charge was lodged supplementing the charge in the warrant and thereafter the hearing was adjourned until February 10, 1953, a period of about two weeks, so that counsel might have an opportunity to prepare to defend against the lodged charge. The hearing held on February 10, 1953 was, on request of counsel, adjourned until February 16, 1953 and thereafter at counsel's request was adjourned until March 6, 1953. It is clear to us that the foregoing facts do not support the claim of lack of time to prepare an adequate defense.

It is also claimed that there was a fatal commingling of investigative, prosecutive and judicial functions on the part of the Special Inquiry Officer. This claim is based on the allegation that said Official undoubtedly examined all of the Service files relating to Pino. In the first place, commingling of functions does not necessarily render a hearing unfair nor deprive the alien of due process (U.S. ex rel *Catalano v. Shaughnessy,* 197 F 2d U.S.; *Belisario v. Zimmerman,* 200 F 2d 282). There is a limitation in the regulations that no Special Inquiry Officer shall conduct a proceeding in any case where he shall have participated in investigative functions. However, the preparation of this case required the Special Inquiry Officer to familiarize himself with the file. On the facts of this case as we see them, the Special Inquiry Officer's conduct did not constitute "investigation" in any generally accepted interpretation of that term. What the Special Inquiry Officer actually did was to so act as to enable him to discharge his obligations, viz—to prepare himself to present evidence, and to examine and cross-examine witnesses.

Moreover, it has been judicially determined that the procedure as outlined in 8 C.F.R. 242(b) provides due process of law. (U.S. ex rel *Marcello v. Ahrens,* U.S.D.C., E.D. La., New Orleans Div., June 8, 1953, 854 Misc.) The record of this hearing shows that the procedure provided in Section 242(b) was meticulously followed. Pino was accorded every safeguard. He had notice of the charges and of the hearing. He was represented by counsel and was given the opportunity to present evidence in his own behalf.

It is further alleged that the hearing was unfair because of a denial of opportunity to cross-examine witnesses [10]. We feel that our treatment of the first procedural argument (supra) adequately disposes of this contention.

Finally, it is contended that the Special Inquiry Officer admitted irrelevant and hearsay evidence which constitute such error as should result in a reversal of the order entered by that official. It is claimed that evidence as to the number of times Pino has been arrested, his criminal record as carried by the Massachusetts Board of Probation, and his criminal record as listed by the Federal Bureau of Investigation has no relationship to the charges on which Pino has been found deportable. In the first place, it is so well recognized as to obviate further discussion that the strict rules of evidence do not apply to administrative proceedings (*Bilokunsky v. Todd,* 263 U.S. 149). Secondly, that evidence was not necessary to or used, either by the Special Inquiry Officer or this Board, in making the requisite finding in this case. Hence, its introduction did not render this proceeding unfair (*Bridges v. Wixon,* 65 S. Ct. 1443). Lastly, the introduction of copies of correspondence with an Assistant Clerk of the Third District Court

[10] On March 4, 1953 the Special Inquiry Officer denied a request for the issuance of the attendance of the Acting District Director and of the Investigating Officer applying for the warrant of arrest.

of Eastern Middlesex (Ex. 10), does not constitute grounds for reversing the decision of the Special Inquiry Officer, for the reasons given immediately preceding; also as a matter of fact, counsel has submitted correspondence from that same officer to support Pino's case.

We find that the hearing accorded Pino was fair in all respects. We have already pointed up our conclusions as to his deportability on the charge lodged at the hearing [11]. The only factor not previously covered in this opinion, and that immaterial here, is that Pino is married to a United States citizen, whom he supports, and has no children.

On the basis of the foregoing, this appeal must be dismissed, and we will now so order.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

Appendix

Date of Arrest	*Charge*	*Disposition*
10/23/15	Stealing ride	On file
9/30/16	"	"
10/14/16	Breaking & entering & larceny (2)	"
1/1/16	Playing ball in street	"
6/1/18	"	"
8/13/18	Larceny	Probation
8/17/18	Stealing ride	"
10/25/18	Larceny	- - - - -
11/25/21	"	Suspended sentence

[11] Cf. Matter of H—, A-3264888, B.I.A., Dec. 12, 1945, for prior decision that placing of case on file in Massachusetts constitutes a "conviction" within the purview of the Immigration Laws.

Date of Arrest	*Charge*	*Disposition*
8/12/22	Breaking & entering	Probation 11/11/22 Filed 11/24/22
3/31/23	Obstructing traffic	On file
5/20/25	Unlawful appropriation auto	6 mos. House of Correction suspended 5/21/26
5/28/26	No license	Filed 6/7/26
7/15/26	Not slowing down	$15 sentence suspended 7/29/26
4/15/27	Speeding	$10 paid
8/4/27	Restricted street	$5 paid
11/15/27	Suspicious person, burglar tools	No bill
(11/25/27) 3/30/28	Carnal abuse of female child	Cf. F. #3, supra, & Exh. #6
12/21/27	Speeding	$15 committed
11/10/31	Attempt to break & enter & larceny, night-time	Dismissed
9/3/32	Met. Dist. Commonwealth rules	Filed
1/13/33	Suspicious person, breaking windows	- - - - -
1/16/33	Breaking & entering, daytime	2 yrs. House of Cor. appealed 12/4/33— not guilty
1/16/33	Accessory before the fact & breaking & entering	Probable cause
6/3/33	Suspicious person, breaking & entering, night-time	- - - - -
6/21/33	Not slowing down	$5 paid
5/4/34	Suspicious person, robbery armed	- - - - -
6/18/34	Speeding	$5 paid
1/28/35	Suspicious person, robbery armed	Released
2/13/35	Suspicious person, breaking & entering	- - - - -

Date of Arrest	*Charge*	*Disposition*
3/19/35	Suspicious person, breaking & entering store	Released
3/11/35	Suspicious person, safe job	"
1/4/36	Suspicious person, murder, armed robbery	- - - - -
1/16/36	Suspicious person, robbery armed	- - - - -
1/29/36	Speeding	$10 paid
2/13/36	Suspicious person, robbery armed	No bill
10/9/36	Suspicious person, armed robbery	- - - - -
11/2/36	Suspicion of larceny	Released on waiver
2/18/37	Conspiracy to steal	No bill
11/27/37	Possessing burglar tools	Dismissed, want of prosecution
1/6/38	Breaking, entering intent to commit felony	3-4 years
	(day) having in possession burglar implements	pardoned 9/6/49
7/12/46	Speeding	$5
12/3/48	Larceny (cf. #3, supra, Exh. #5)	
7/5/50	Violation of fish & game law	$10

Att'y Gen. v. Pelletier, 240 Mass. 264

Karasik v. Bockus, 393 Mass. 371

City of Boston v. Santosuosso, 307 Mass. 302

Comm. v. Gorham, 99 Mass. 420

Mariano v. Judge of District Ct., 243 Mass. 90

Comm. v. Boldi, 250 Mass. 528

Comm. v. Hersey, 324 Mass. 245

Fay v. Harlan, 128 Mass. 244

1944 Op. Att'y Gen. 17

1931 Op. Att'y Gen. 51

Petitioner's Traverse.

I

The petitioner traverses the first sentence of paragraph VI of the Respondent's Return and the respondent's allegation after the semi-colon in said paragraph VI.

II

The petitioner traverses the respondent's denial in paragraph VII of the Respondent's Return.

III

The petitioner traverses the respondent's denial in paragraph IX of the Respondent's Return.

IV

The petitioner traverses the respondent's denial in paragraph X and also traverses his assertion that the hearings accorded petitioner were in accordance with the procedural requirements of the Immigration and Nationality Act and the regulations promulgated thereunder.

V

The petitioner traverses the first sentence in paragraph XI of the Respondent's Return and also traverses the assertion in the second sentence that the lodged charge merely corrected an error of form.

VI

The petitioner traverses the allegation in paragraph XII of the Respondent's Return that counsel for petitioner presented each of his objections separately during the hearing and obtained rulings thereon.

VII

The petitioner traverses paragraph XIII of the Respondent's Return.

VIII

The petitioner traverses paragraph XV of the Respondent's Return.

IX

The petitioner traverses paragraph XVI and each subdivision thereof of the Respondent's Return.

X

And further answering, the petitioner says that the Respondent's Return is incomplete in that it does not include the record of the proceedings which culminated in the deportation order including but not limited to:

A. The warrant for arrest and the application therefor.

B. The request for the issuance of subpoenas dated March 2, 1953.

C. The denial of said request dated March 4, 1953.

D. The record of the proceedings before the Special Inquiry Officer.

E. The decision of the Special Inquiry Officer dated March 24, 1953.

F. The letter dated January 19, 1953 from Henry Nicolls by William F. Wall to the Assistant Clerk of the Third District Court of Eastern Middlesex.

G. The reply dated January 29, 1953.

H. The supplemental letter by the Assistant Clerk of the Third District Court of Eastern Middlesex dated June 4, 1953.

I. The decision of the Board of Immigration Appeals dated August 11, 1953.

J. The order and decision in the deportation case of Anthony Pino dated October 26, 1950 (file No. A-2136979 WU).

By his attorney:

PAUL T. SMITH

Portions of Statement and Argument by Mr. Smith at Hearing January 4, 1954.

(4)

* * *

The Court. I am going to ask you now to make an offer of proof as to what the witnesses will testify.

Mr. Smith. All right, if I must make an offer of proof, I offer to prove that if Herbert F. Callahan were called

(5)

to the witness stand he would testify that it has been the practice in the Commonwealth of Massachusetts for 40 years—that he has specialized on the criminal side of the courts in Massachusetts and that he is an expert with regard to the criminal law of Massachusetts and that if he were to be asked the hypothetical question to the effect as to whether or not a person who has been complained against in the Third District Court of Eastern Middlesex for the crime of larceny of a dozen golf balls, and pleaded not guilty, and was then found guilty, and that the case was placed on file, that that finding would not be a conviction against such a person.

And that he would further testify, in answer to questions, that a judge of the District Court upon his own motion, or that the defendant upon his motion could request that the case be taken off the file and that the defendant could then be sentenced, and that the defendant would then have a right of appeal and to a trial de novo in the Superior Court.

And that he would further testify that even if there had originally been a suspended sentence imposed against such defendant and probation imposed, and that at a later date the judge ordered that the sentence be revoked and the case placed on file, that there would not be a conviction against such a defendant, and that such a defendant would have a right of appeal and a trial de novo in the Superior Court.

It is my understanding that he would further testify
(6)
that while that case is on file, the case is purely in a state of being continued as though it had originally been continued without any finding, and that the rights of the defendant had not been so adjudicated that he couldn't appeal and get a trial de novo.

It is my understanding that if Attorney Francis Juggins were called to the witness stand, he would testify to the same effect.

It is my understanding that if Attorney Louis L. Bobrick of Cambridge were called to the stand, he would testify as an expert also as having been the attorney who defended Pino in the Third District Court of Eastern Middlesex, and would testify that based upon his experience in the Third District Court of Eastern Middlesex, and his experience and training as an attorney in the Commonwealth of Massachusetts, that the finding as it appears upon the record of conviction which is before your Honor now, and which was introduced the last time that we appeared before your Honor—

• • •

(10)
Mr. Smith. And that Mr. Bobrick would further testify, based upon his experience in the Third District Court of Eastern Middlesex, that it is the practice there to revoke sentences on occasion and place a case on file, and that after
(11)
such a case is placed on file that the case could be taken off the file and sentence imposed and an appeal taken to the Superior Court, with a trial de novo.

We also have here, if your Honor please, the assistant clerk of the Third District Court of Eastern Middlesex, who would testify—or it is my understanding that he would testify, that he is familiar with the record in the Pino case

as it appears before your Honor, and that as a matter of law, based upon his experience, and as a matter of practice, based upon his experience, that the finding made by the court in the case against Pino over in the Third District Court of Eastern Middlesex, would have an effect of revoking that prior sentence, that the status in the case is that it is on file and that at any time the case can be taken off the file, either upon the motion of the judge or upon motion of the defendant, that a sentence could then be imposed, and that the defendant would have a right to appeal, and a right to a trial de novo.

I might say, from the standpoint of whether or not this witness should testify, that a letter from Mr. Cronin, the assistant clerk of court, was used in evidence by the Board of Appeals, of the Immigration Department, that it was referred to in its findings, that in our petition for a writ of habeas corpus we make reference to it, and I submit, if your Honor please, that Mr. Cronin certainly should be permitted to testify at least in respect to that.

(12)

Also, I might add that I understand Mr. Cronin is here under government subpoena.

There is another witness by the name of James F. Monahan, who is a member of the bar of Massachusetts, an assistant clerk of the Boston Municipal Court, who has been such for some 30 years. He has been assistant clerk in the criminal side of the court, and if allowed to testify, he would testify, based upon his experience as a lawyer, that when a defendant has been convicted and given a suspended sentence and probation, and then at a later date that sentence is revoked and the case placed on file, that that defendant at any time is subjected to having the case taken off file, a sentence imposed, and that at that time he would have a right of appeal to the Superior Court, and a trial de novo.

He would also testify that that is the practice which has been followed in the Boston Municipal Court, which I think your Honor understands is probably the busiest court in the Commonwealth of Massachusetts.

In addition to that, all of the aforementioned witnesses would testify to a hypothetical question that assuming a person was complained against for larceny of a dozen golf balls, and pleaded not guilty and went to trial and was found guilty, and was sentenced to one year in the House of Correction, and appealed therefrom and then withdrew his appeal, and the sentence was suspended by the District Court with an order of a year's probation; and that there-
(13)
after there was a motion for a new trial, and the motion for new trial was granted, and that upon hearing at the new trial there was a finding of guilty and a sentence of a year in the House of Correction, from which there was an appeal, and that subsequently that appeal was withdrawn and there was a sentence of a year in the House of Correction, suspended, and a year's probation; and that upon the date of January 20 of 1953, that the sentence was revoked by order of the court, and placed on file, so that docket entry appears and so that record appears that the court revoked the sentence and placed the case on file, and that in that case the case is on file as of today and that the District Court upon motion of its own, or upon motion of the defendant, could remove the case—

Mr. Medalie. This is the most unreliable offer of proof I have ever heard.

Mr. Smith. Well, I don't know—

The Court. I will let Mr. Smith continue.

Mr. Smith. That in such an event the case would still be on file, and that upon motion of either the defendant or the court, the matter could be removed from the file, the

defendant sentenced, and that he would have a right of appeal and a trial de novo.

That is what I expect these witnesses to testify to. • • •

• • •

(32)

Mr. Medalie. In the first place, we have no doubt as to the position of eminence in the criminal field of these witnesses and their long and capable experience in the field, • • •

• • •

(34)

The Court. I am ruling it is a matter of law, that it is a matter for me to pass on, and I have to pass on the question of whether or not that is a legal conviction. I don't think it rests with the lawyers to tell me; I have got to find the law myself. I will preserve your rights. I may be wrong, but they are preserved for the Circuit Court of Appeals, and I will exclude it.

• • •

(36)

Mr. Smith. With respect to the certified copy of the record of the alleged conviction of Anthony Pino concerning the golf balls, the larceny of the golf balls, it is agreed that that may go in, with the exception that the attention of the Court should be drawn to the fact that on the back of that record it is agreed by counsel that where the words appear "January 28, 1949, appeal withdrawn by leave of court and original sentence one year House of Correction suspended", that following the word suspended the word "to" should appear, suspended to January 30, 1950. It should also appear that there is a period thereafter, and then the

(37)

words "appeal waived" and then a period after the word waived, and that the last item thereon in this record is

"sentence revoked" and then a period. And then "on file". They apparently did not in this record use any periods or commas, and we have agreed that is what it should be.

Mr. Medalie. I think it should also be stated, if we treat the January 30, 1950 as applying to what follows the entry of January 28, 1949, that it should be agreed between counsel that the entry of "sentence revoked; on file" occurred on January 30, 1950.

Mr. Smith. Yes, we agree to that.

Mr. Goodman. And the "appeal waived" entry occurred on January 28, 1949.

Mr. Medalie. I will agree to that.

Mr. Smith. It is agreed that the "appeal waived" entry is as of January 28, 1949, and that the "sentence revoked; on file" entry is as of January 30, 1950, right?

Mr. Medalie. That is correct.

* * *

(45)

* * * I ask at this point to have your Honor take judicial notice of the fact that the law in Massachusetts is that when a person is brought before the District Court, any District Court of the Commonwealth of Massachusetts, charged with a crime within the jurisdiction of that court, and he pleads not guilty and is found guilty and is then sentenced and appeals from that sentence and then withdraws his appeal and makes a motion for a new trial, and that motion is granted, and thereafter he is tried and still pleads not guilty and is found guilty and sentenced to a year in the House of Correction and appeals therefrom, and then withdraws his appeal and is given a suspended sentence and a year's probation, and that on a day equal to the same date that he was given the suspended sentence and probation, that is, one year later, the Court makes an order revoking the sentence and placing the case on file,

that that is not as a matter of law, in Massachusetts, a conviction.

The Court. If I made that decision—don't misunderstand me; I am not finding any fault with you, but if I decide that, that is the end of this case. Don't you agree with me, Mr. United States Attorney?

Mr. Medalie. I think you are right, your Honor, yes.

• • •

(46)

The Court. I couldn't take judicial notice of it. I have to make a determination of it later on.

• • •

Order.

McCarthy, J. After hearing on a writ of habeas corpus, and in accordance with the Opinion handed down February 1, 1954, it is

ORDERED that the Writ be and it hereby is discharged, and the petition is dismissed.

By the Court:

JOHN F. DAVIS
Deputy Clerk

William T. McCarthy
United States District Judge
February 1, 1954

Opinion.

February 1, 1954

McCARTHY, D. J.

The petitioner, Anthony Pino, has come before this court on a petition for a writ of habeas corpus arising out of a

deportation order predicated upon provisions of the Immigration and Nationality Act of 1952, with particular application to Section 241(a)(4), 8 U.S.C.A. Sec. 1251(a)(4). This petitioner had been ordered deported upon the ground that he had been convicted after entering the United States of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. He had exhausted his administrative remedies and then filed the instant petition for the issuance of the Great Writ contending that the state of a record in the Third District Court of Eastern Middlesex, Commonwealth of Massachusetts, did not satisfy the definition of a conviction and that his right to due process under the Fifth Amendment of the Constitution of the United States in the deportation proceedings was denied. This court issued the writ and the body of the petitioner was produced at the hearing.

The facts and circumstances surround a fifty-eight year old married alien who was born in Divieto, Messina, Italy, on May 7, 1907, and was admitted to the United States on May 28, 1908, for permanent residence. At that time he was accompanied by his mother, was a little over a year old, and from that time down to the present he has maintained a residence in the United States.

The deportation order is based upon a charge that in 1928 the petitioner was convicted of carnal abuse and that in 1949 he was convicted of the larceny of a dozen golf balls. The Court quotes from paragraph VI of the petition which reads in part: "The petitioner has not been convicted of the larceny of twelve golf balls since that case is presently pending in the Third District Court of Eastern Middlesex, Cambridge, Massachusetts, the case having been placed on file. If and when the petitioner is sentenced he will have a right of appeal to the Superior Court and to a trial de novo . . ."

It is the contention of the petitioner that in order to have a conviction within the meaning of the Immigration and Nationality Act there must be a sentence or final disposition, that there is no such status here because the case may be "taken from the file", sentence imposed, and an appeal taken to the Massachusetts Superior Court, thereby vacating the entire proceedings of the lower court and restoring the case to a "de novo" status.

The record shows, and I find it a fact, that on December 28, 1948, he was found guilty on a charge of stealing one dozen golf balls and was sentenced to a year in the House of Correction; he promptly appealed the decision of the lower court, posted a bond, and was bailed; then on December 28th, within the statutory time permitting a person to withdraw an appeal from a sentence, the appeal was withdrawn, a motion for a new trial was filed by the petitioner, and this motion was allowed. On January 4, 1949, there was a trial "de novo" on the same complaint and the petitioner was again found guilty and was sentenced to a year in the House of Correction, from which an appeal was promptly taken; on January 28th this appeal was again withdrawn; the District Court judge reimposed the sentence, then suspended it, and made an order to put this petitioner on probation with the sentence suspended until January 30, 1950, and on the latter date, when the period of probation expired, the sentence was revoked, and the case was placed on file. On February 3, 1953, a motion for a new trial was filed. That motion was taken under consideration by another judge of the District Court and at the time of the filing of this petition there had been no decision on the motion for a new trial.

Since the crime of larceny of which the petitioner is alleged to have been convicted occurred in the Commonwealth of Massachusetts, the Court must look to the law of Massachusetts for the purpose of determining whether or not

the history of this case in the Third District Court reveals a conviction. *United States ex rel. Freislinger v. Smith,* 7 Cir., 41 F. 2d 707.

In *Commonwealth v. Gorham,* 99 Mass. 420, the defendant in an arson case offered himself as a witness. The prosecutor, for the purpose of impeaching his credibility, offered in evidence an indictment for forgery and the court record which showed that the defendant had pleaded guilty, after which plea the indictment was placed on file, but which afterwards had been brought forward and was pending at the time of the trial of the defendant. Exceptions to the admission of this evidence were sustained and the court stated the following: "The term 'conviction' is used in at least two different senses in our statutes. In its most common use it signifies the finding of the jury that the prisoner is guilty, but it is very frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt . . . We think . . . that the word 'conviction' is here (Gen. Sts. c. 131 sec. 13) used in the broader and less technical sense, and implies the judgment of the court. . . . " (at page 422).

The landmark definition of the word "conviction", in Massachusetts law, is to be found in *Commonwealth vs. Lockwood,* 109 Mass. 323, 325. The issue in this case was whether under the Constitution of the Commonwealth prohibiting the Governor from pardoning a defendant *until his conviction,* the executive and the Council had acted prematurely in granting a pardon to a defendant who had been found guilty but as against whom no judgment had been made. The Court said: "The ordinary legal meaning of 'conviction', when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropri-

ate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained . . ." The pardon was, therefore, held to be valid.

The Supreme Judicial Court had occasion, in *Commonwealth v. Kiley,* 150 Mass. 325, to define the term "conviction" as used in St. 1887, c. 392, which provided that "the conviction by a court of competent jurisdiction of a person licensed under the provisions of" laws relating to licenses to sell intoxicating liquors would of itself make the person's license void. The court said, at page 326, "Under this provision, the effect of a conviction of the kind named is to deprive the defendant of a valuable right, without an opportunity for further trial or investigation. We are of opinion that nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word 'conviction' as here used. At any time before a final judgment of the court, a motion in arrest of judgment may be made, or the verdict may be set aside upon a motion for a new trial, on the ground of newly discovered evidence, or for other good cause; and, upon further proceedings, it may turn out that the defendant is not guilty." For the purpose of this statute, therefore, "conviction" meant more than a finding or confession of guilt.

In *Munkley v. Hoyt,* 179 Mass. 108, a petition was brought for a writ of certiorari to correct proceedings of the board of registration in pharmacy. It appeared that the petitioner had pleaded guilty to a complaint for the illegal sale of intoxicating liquor. On his motion, the court placed the complaint on file and took no further action. St. 1896, c. 397, sec. 9 provided that the board of registration might, after hearing suspend or revoke a pharmacist's registration for cause, but that the registration should not be suspended or revoked *for a cause punishable by law* until after conviction by a court of competent jurisdiction.

Interpreting the statute, the court said that (at page 111) "the plain purpose of the statute is that the hearing before the board shall be independent of any proceeding before any other court or tribunal, and that the decision of the board shall be upon the evidence produced there and not elsewhere. The record of the conviction of the accused by a verdict of a jury is not admissible at the hearing as evidence of his guilt. It is true that proof of his confession in open court of his guilt would be admissible against him at the hearing just as any other admission of guilt made by him would be, wherever made, but not upon the ground that such confession is conviction but that it is an admission. In no way is the judgment of the board upon the question of the guilt of the accused to be affected by the proceeding in another court." A conviction in a court of competent jurisdiction, therefore, was deemed to be a condition precedent to suspension or revocation of registration by the board, but the conviction was not to be considered as evidence upon which, in and of itself, the judgment of the board was to be predicated. The term "conviction" was given its ordinary legal meaning which, said the court, provided an independent hearing before each tribunal and independent action on the part of each.

A careful study of the foregoing decisions and of the others cited by both the petitioner and the respondent requires the conclusion that the record of the case involving the larceny of a dozen golf balls represents a conviction under Massachusetts law, for the primary reason that there need not be a sentence or final disposition in order for a conviction to be had.

In certain situations, as shown above, the technical requirements of statutes have engrafted upon the ordinary meaning of conviction the requirement of a sentence. Where, for example, one sought to use a record of "conviction" to impeach the credibility of a witness, Mass. G.L.

(Ter. Ed.) c. 233, Sec. 21, as interpreted by the Supreme Judicial Court, imported a sentence. *Karasek v. Bockus*, 293 Mass. 371. *Attorney General v. Pelletier*, 240 Mass. 264. *Boston v. Santosuosso*, 307 Mass. 302, 330. The definition in the *Lockwood* case, supra, however, controls ordinarily and, with respect to the so-called "impeachment statute", its wording has now been changed to define "conviction", when referring to a felony conviction at least, simply as "a plea of guilty or a finding or verdict of guilty."

The conclusion that the ordinary legal meaning of "conviction" is to be employed when the court is concerned with a construction of Title 8, U.S.C.A. sec. 1251(a)(4) is buttressed by the fact that Congress in 1952, when it amended this section of the deportation statute, eliminated the earlier requirement that imprisonment was a prerequisite to deportation. Congress is now concerned only with whether or not the alien has pleaded or been found guilty of two crimes involving moral turpitude.

There is a second phase of the petitioner's argument—the contention that since, on January 30, 1950 the Third District Court of Eastern Middlesex "revoked" the sentence which it had earlier imposed upon the petitioner and placed the case "on file", the case is restored to a posture where the court or the petitioner could reopen the case at any time, sentence might be imposed and an appeal might be taken to the Superior Court of Massachusetts, where a trial "de novo" could be had.

In this respect, the original court record is important, since it discloses that after a finding of guilty the petitioner was sentenced to a year in the House of Correction, the sentence was suspended to January 30, 1950, and, after the entire period of probation had been served, the original sentence was revoked and the case then placed on file.

There is statutory authority in the Commonwealth of Massachusetts for disposing of a criminal complaint by placing it on file. Mass. G.L. (Ter. Ed.) c. 218, sec. 38. The court may, furthermore, when a sentence of imprisonment is imposed, order execution of the sentence or, under the suspended sentence statute, G.L. c. 279, sec. 1, suspend the execution of the sentence and place the petitioner on probation. When, however, a sentence is suspended as in the instant case and the probationary period has been completed satisfactorily, the trial judge of the District Court of Eastern Middlesex had no authority to revoke the order suspending the sentence, place the case on file, and hold the threat of a sentence over a defendant's head forever. The district courts of Massachusetts have no power to keep a defendant on indefinite probation. *Commonwealth v. Maloney*, 145 Mass. 205.

The petitioner contends that a criminal case placed on file can be re-opened at any time and his attorney cites the cases of *Commonwealth v. Dowdican's Bail*, 115 Mass. 153, *Marks v. Wentworth*, 199 Mass. 44, and *Commonwealth v. Carver*, 224 Mass. 42. I have no quarrel with the law for the reason that in these three cases there never was an imposition of sentence.

This court is satisfied that under Massachusetts law the petitioner was convicted of larceny, which conviction satisfies the requirements of Section 241(a)(4) of the Immigration and Nationality Act of 1952.

The petitioner further asserts that the conduct of the proceedings upon which the order of deportation was predicated was in violation of his rights under the due process clause of the Fifth Amendment of the United States Constitution because the issuance of the warrant of arrest was irregular since the application specified that the petitioner had been convicted of "assault with intent to rape and rape" and "larceny", whereas court records

showed that the first conviction with which we are concerned was for carnal abuse of a female child. The special inquiry officer lodged the charge of carnal abuse. There is no necessity for a prolonged discussion on the merits of this claim. It is sufficient to note that the titular designation of Section 23 of Chapter 265 of the General Laws of Massachusetts is "Rape of Child" and that "carnal knowledge" and "abuse" is contained in the language following the designation. While there may have been an error of description in the application for the warrant, it is not the purpose or intention of this court to examine, approve or disapprove of every step and ruling in the proceedings before the Special Inquiry Officer, for the simple reason that this is not the function of the Court. *Berkman v. Tillinghast,* 1 Cir. 58 F. 2d, 621, 623. Nevertheless, the Court has given considerable time and serious consideration to each of the charges lodged by the petitioner before arriving at the conclusion that there was no error committed by the officer so flagrant as to deny to Pino the essentially fair hearing which was due to him.

In passing it might be well to note a few of the petitioner's contentions with respect to denial of procedural due process, without going too far into details. He claims that he was denied an opportunity to prepare his defense adequately, although the record shows a first notice of more than two weeks, and three periods of adjournment thereafter, which facts do not support the claim of lack of time. A "commingling of investigative, prosecutive and judicial functions on the part of the Special Inquiry Officer" is also charged. There is no evidence, however, that the officer exercised any investigative function. He may have carefully studied the file in the case, but certainly no one could contend that that constituted an investigation. It is inescapably clear also that this court cannot conclude that the officer had pre-judged the case.

Of more serious significance is the claim that the right of the petitioner was infringed by the introduction of a record of arrests and several convictions. This record was a lengthy one and noted some very serious charges which did not result in arrest, trial, or punishment. I am satisfied that this record should not have been introduced because of its highly incendiary character, but an examination of it discloses the fact that it was wholly unnecessary in reaching the conclusion that the petitioner had been convicted twice of crimes involving moral turpitude. It follows, therefore, that the introduction of this record did not render the proceeding unfair, especially in view of the fact that strict rules of evidence applicable in judicial proceedings do not obtain in deportation inquiries. *Berkman v. Tillinghast*, supra.

Finally, it was contended by the petitioner's counsel that the crimes for which Pino was convicted, assuming that he was convicted, necessarily involve the essential elements of moral turpitude. In connection with the conviction for carnal abuse, under Massachusetts General Laws, c. 265, sec. 23, this claim is without merit. This crime has been classified as so-called "statutory rape" the punishment for the commission of which could well have taken the form of a life sentence, and that it is an act of depravity in the private and social duties a man owes society in general cannot be doubted. *Ng Sui Wing v. United States*, 7 Cir. 46 F2d 755. *Bengel v. Nagle*, 9 Cir. 17 F. 2d 719. The basis for the deportation order for the second conviction is that which charges the larceny of a dozen golf balls.

It is inescapably clear that an act involving moral turpitude is an act of baseness or depravity contrary to accepted moral standards. While there may be a predilection that the theft of a dozen golf balls does not come within the purview from a moral point of view of this definition, this Court is bound to accept established precedents

of courts of appellate jurisdiction. The ruling case in this circuit is *Tillinghast v. Edmead*, 1 Cir., 31 F. 2d 81, which affirms the principle that a conviction of petty larceny is the conviction of a crime involving moral turpitude. It is indisputably clear also under Massachusetts law that larceny of less than one hundred dollars is a misdemeanor. Although one may agree with the statement of Judge Anderson in his dissenting opinion in the Tillinghast case that "It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude", such is the law not only in this circuit, but also in other circuits. It is the duty of a judge of a District Court of the United States to follow the law as it is beaconlighted by the decisions of courts of higher jurisdiction. The Court of Appeals for this circuit has spoken in the case of *Tillinghast v. Edmead*.

It is inescapably clear, therefore, that this writ must be and it is hereby ordered discharged.

Notice of Appeal to the Court of Appeals under Rule 73(b).

Notice is hereby given that Anthony Pino, petitioner in this action, hereby appeals to the United States Court of Appeals for the First Circuit from the decision and order discharging the writ of habeas corpus entered in this action on February 1, 1954.

PAUL T. SMITH
Attorney for Appellant, Anthony Pino
209 Washington Street
Boston 8, Massachusetts

[U.S. Dist. Ct.
Filed in Clerk's Office
Feb. 2, 1954
Mass. Dist.]

Motion for Bail Pending Appeal.

Now comes the petitioner in the above entitled action and moves that he be enlarged upon such bail as to this Honorable Court may appear fitting in the circumstances of this particular case.

By his attorney:
PAUL T. SMITH

Feb 2, 1954, McCarthy J
Denied after hearing

By the Court
JOHN F DAVIS
Deputy Clerk

Request for Rulings of Law.

Pending review of a decision discharging a writ of habeas corpus after it has been issued, the petitioner may be enlarged upon such recognizance with surety as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

By his attorney:
PAUL T. SMITH

NOTE

This request is merely a quotation from Rule 38 of the Rules of the Circuit Court of Appeals. The Rules of the Circuit Court of Appeals were revised and reissued on July 1, 1953, after the McCarran Act, but no change was made in Rule 38. Obviously, the Circuit Court of Appeals in reissuing Rule 38 holds that the McCarran Act did not limit that rule. We cannot follow the United States Attor-

ney's argument that Rule 38 is limited by the McCarran Act which came before the rule itself was reissued.

Feb 2, 1954, McCarthy J
Denied, By the Court

JOHN F DAVIS
Deputy Clerk

Portions of Statement by Court from Transcript of Hearing Dated February 2, 1954, on Motion for Bail Pending Appeal.

• • •

(29)

It is my considered judgment that I have no authority, as I interpret Section 1252, as I read it, and in the light of established precedents in this district, to enlarge this petitioner on bail.

I want to be frank with counsel because I think it is important for me to make a decision so that the matter can proceed forthwith with an appeal and therefore the request for rulings of law:

"Pending review of a decision discharging a writ
(30)
of habeas corpus after it has been issued, the petitioner may be enlarged upon such recognizance with surety as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case."

is denied.

I could have taken it under advisement but I have made an examination and research and it is my considered judg-

ment that I haven't the authority. If I did, Mr. Katz, I would be very happy to, but I haven't the authority.

Notice of Appeal to the Court of Appeals under Rule 73(b).

Notice is hereby given that Anthony Pino, petitioner in this action, hereby appeals to the United States Court of Appeals for the First Circuit from the order denying the petitioner's motion for bail pending appeal entered in this action on February 2, 1954.

PAUL T SMITH
Attorney for Appellant, Anthony Pino
209 Washington Street
Boston 8, Massachusetts

[United States Dist. Ct.
Filed in Clerk's Office
Feb 2 1954
Mass. Dist.]

[fol. 119] **Appendix to Brief for Appellee**

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED JANUARY 28, 1953, EXAMINATION OF ANTHONY PINO (LAWRENCE F. O'DONNELL, ATTORNEY OF RECORD).

By Special Inquiry Officer to Respondent:

Q. The original warrant of arrest in this case has been endorsed to show that it was served on you, at Boston, Massachusetts, on January 10, 1953, at which time you were told why you were arrested, you were told of the conditions under which you might be released from custody, you were told at that time of your right to have an attorney, and you were furnished with a copy of the warrant. Is that information correct?

A. Yes.

Q. A copy of this warrant of arrest is now entered into the record as Exhibit No. 1. This warrant charges you with being subject to deportation under the provisions of Section 241(a) (4) of the Immigration and Nationality Act, in that, at any time after your entry into this country, you have been convicted of two crimes involving moral turpitude, namely: Assault with intent to rape and rape; and larceny; such crimes not arising out of a single scheme of misconduct. Do you understand the charge?

A. Yes.

Q. Do you understand that I have entered a copy of your warrant as Exhibit No. 1?

A. Yes, sir.

Q. You are hereby advised that you will have a reasonable opportunity to examine the evidence against you, to present evidence in your own behalf, and to cross-examine witnesses presented by the Government. These functions of course will be done by your counsel. Is that understood?

A. Yes, sir.

Q. What is your age today?

A. Forty-five.

Q. What is the year of your birth?

A. May 7, 1907.

[fol. 120] Q. Where were you born?

A. Messina, Sicily, Italy.

Q. Were you born in the city of Messina, or one of the outlying towns?

A. One of the outlying towns. I don't know how it is spelled.

Q. According to the information contained in my file, it appears that you were born in Divieto, Messina, Italy. Will you agree that this is the place where you were born?

A. Yes.

Q. Of what country are you a citizen?

A. Italy.

Q. Of what race of people are you?

A. Italian.

Q. How many times have you come to the United States?

A. Once.

Q. Can you place the date of your entry into this country?

A. Somewhere around 1908, I am not sure.

Q. I will refresh your memory on what the warrent alleges. It states May 25, 1908, at the port of Boston, Massachusetts, on the SS ROMANTIC. To the best of your knowledge and belief, are those the facts of your entry?

A. Yes.

Q. For what purpose were you coming here?

A. To live.

Q. Were you accompanied by any one at that time?

A. By my mother.

Q. I show you a Certificate of Admission of Alien Form 505, dated March 28, 1936, at Boston, Massachusetts, showing the admission for permanent residence, on the SS ROMANIC, at Boston, Massachusetts, May 25, 1908, of Antonio Pino, accompanied by Caterina Pino. After you have examined this document, please advise me if in your opinion it relates to your admission to the United States for permanent residence? (Document examined by counsel and respondent.)

A. Yes.

Q. A copy of this Certificate of Admission of Alien,

which you have identified, is entered into this record as Exhibit No. 2. Do you understand?

A. Yes, sir.

• • • • • • •

[fol. 121] Q. I show you a certified copy of conviction in the case of the *Commonwealth* v. *Anthony Pino*, docket No. 8649, Third District Court of Eastern Middlesex, Cambridge, Massachusetts, consisting of a complaint charging Anthony Pino with larceny; and court docket wherein a plea was originally entered of not guilty and a judgment of guilty was found on December 23, 1948 from which an appeal was taken; and which also contains the entry that on December 28, 1948 appeal was withdrawn by leave of court and on the same day a motion for a new trial was allowed and the finding revoked; on January 4, 1949 there was a judgment of guilty and a sentence of one year in the House of Correction; appealed on January 10, 1949; January 28, 1949 appeal withdrawn by leave of court and original sentence of one year in the House of Correction suspended; last entry on the docket showing January 30, 1950 sentence revoked and matter placed on file. Does this record relate to you?

A. Yes.

By Counsel: This certified copy relates in part to the stealing of twelve golf balls of value less than $100.

By Special Inquiry Officer to Respondent:

Q. This document is entered into the record as Exhibit No. 5. Is this understood by the respondent?

A. Yes, sir.

Q. I show you a certified copy of conviction, Docket number 1586 of 1928, Superior Court, Boston, Massachusetts, consisting of an indictment of Anthony Pino and others for abuse of a female child; and court record showing that the indictment was found January 9, 1928; and January 16, 1928, Pino pleaded guilty to said indictment; January 17, 1928, after part of testimony was introduced, said Pino was called in said court and was defaulted; March 15, 1928, said Pino was again tried by a petit jury; March 20,

1928, said jury returned a verdict that said Pino was guilty of said indictment; March 29, 1928, Pino for the crime set [fol. 122] forth in the indictment was sentenced to be committed to the Massachusetts Reformatory, Concord, Massachusetts for a term of five years and one day. After examining this document, please advise me if it relates to you?

A. Yes.

Q. This document is made a part of the record and marked Exhibit No. 6. Do you understand?

A. Yes.

Q. As you and counsel were previously advised you would be offered a reasonable opportunity to examine the evidence in this case, which consists of Exhibits No. 5 and No. 6, it is now made available to you for further examination.

A. (By counsel): Thank you, we have examined.

Q. In view of the evidence now at hand, I charge you with being in the United States in violation of Section 241(a) (4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Abuse of a female child; and larceny. Do you understand the nature of the new charge lodged against you?

A. Yes, sir.

By Special Inquiry Officer to Counsel:

Q. Under the existing regulations which flow from the Immigration and Nationality Act, when a new charge is lodged during the course of a proceeding, counsel may request an adjournment for the purpose of preparing his defense on the new charge.

A. I so request and, first of all, request your indulgence while I have a conference with my esteemed associate here.

(Recess permitted by Special Inquiry Officer for purpose requested.)

By Special Inquiry Officer:

Unless you are notified by the District Director to the contrary, the hearing will be resumed February 10, 1953, at 9:00 A.M. The hearing is now adjourned.

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[fol. 123] EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED FEBRUARY 10, 1953, EXAMINATION OF ANTHONY PINO (LAWRENCE F. O'DONNELL, ATTORNEY OF RECORD).

By Special Inquiry Officer: Motion is granted. Adjournment is had until Monday, February 16, 1955, at 1:00 P.M., at this office.

By Counsel: Mr. Special Inquiry Officer, at this time I make the request that I be loaned a transcript of the record of the first hearing.

By Special Inquiry Officer: One copy thereof is loaned to you with the instructions against making copies thereof and as to returning it to this Service on demand, as required by the Immigration regulations.

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EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED FEBRUARY 16, 1953, EXAMINATION OF ANTHONY PINO (LAWRENCE F. O'DONNELL, ATTORNEY OF RECORD).

By Special Inquiry Officer: With reference to counsel's request that the investigator be produced in order that he may be cross-examined, you are advised that warrant of arrest in this case was not predicated upon an investigation made by any investigator but rather was predicated on evidence contained in the file of Mr. Anthony Pino. You were previously furnished, in accordance with the regulations, the evidence at hand in the case. To satisfy you, I shall show you, as contained in the file, the application for the warrant of arrest which shows that it was based on two certified copies of conviction only.

The motion is therefore denied. Please proceed.

[fol. 124] By counsel: I take my exception to a denial of that motion.

I can't conceive how any arrest could be effected without a preliminary investigation. It follows of necessity there had to be an investigation and the Immigration and Naturalization Service has an Investigation Department and I feel, in order to properly conduct the offense, in addition to preparation, there should be an opportunity to cross-examine the accusers, as provided in the Act.

By Special Inquiry Officer: As you were told before, the warrant of arrest is based on certified copies of conviction rather than on the report of an investigation. It is conceded that the application for the warrant of arrest was made by the Investigation Section of this Service, but it appears that it was based on a review of the file.

• • • • • • •

By Special Inquiry Officer to Counsel:

Q. Does counsel at this time refuse to begin the questioning of the respondent, for which this hearing was adjourned on February 10th?

A. It isn't a question of refusing. It is a question that presupposes that before you start asking any questions, whether you have the capacity to ask and whether you have the information on subject matter you are to discuss. You are taking ten steps ahead of the elementary position. It isn't a question of refusal. It is a question of fundamental capacity.

By Special Inquiry Officer: The issues before me in this hearing are two convictions, certified copies of which were made available to you and to the respondent during the course of this proceeding. They are not unusual issues. They are the Government's evidence in the case. The issues will be narrowed simply to whether or not the respondent is deportable because of these two convictions, nothing else.

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[fol. 125] EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED MARCH 6, 1953, EXAMINATION OF ANTHONY PINO (PAUL T. SMITH AND MANUEL KATZ, ATTORNEYS OF RECORD).

By Counsel: May it appear on the record that counsel feels that he is as fully familiar with the procedure under the McCarran Act as the Special Inquiry Officer; that counsel does not feel that he needs any instruction as to the procedure of law; and that counsel is fully prepared to take care of his client and present the evidence adequately;

* * *

* * * * * * *

By Counsel: Can it be agreed that the warrant in this case was issued only upon the evidence set forth in the application for warrant marked Exhibit No. 8?

By Special Inquiry Officer: Since the application for the warrant states that a warrant be issued on the basis of certified copies of court records numbers 1586-1928 and 8649-1948, it is agreed insofar as that statement appears in the application for the warrant.

By Counsel: May it appear on the record that counsel for the respondent disagrees with the ruling of the Special Inquiry Officer, that is the ruling of law of the Special Inquiry Officer, and contends that under the McCarran Act the officer issuing the warrant must be satisfied that there has been a prima facie case made out based on the contents of the application for warrant and an objection and exception are made to the Special Inquiry Officer's ruling.

* * * * * * *

By Counsel: May it be agreed that if the Special Inquiry Officer had investigated this case, that he would not be qualified to sit as Special Inquiry Officer?

[fol. 126] By Special Inquiry Officer: It is so agreed, with however the understanding that, "Investigation", as used by counsel is subject to interpretation.

EXCERPTS FROM HEARING BEFORE McCARTHY, J. ON JANUARY 4, 1954

Case No. 53-79-M

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The Court: Now I have got it up to date. Mr. Smith has furnished his offer of proof, and I am going to give you a chance to be heard on it. What do you say in answer to Mr. Smith's offer of proof?

Mr. Medalie: In the first place, we have no doubt as to the position of eminence in the criminal field of these witnesses and their long and capable experience in the field, although it would probably be the first time that expert testimony was permitted in the federal court on a clear question of law, which is the fundamental question of law before this court.

• • • • • • •

• • • And it has never been proper to prove a question of law by witnesses. The question of the meaning of this record is to be determined by your Honor's investigation of what the law of Massachusetts is, and what the meaning of the word conviction is in the Immigration and Naturalization Act of 1952.

No amount of expert testimony can tell you now what Congress meant or what the Supreme Judicial Court meant; that is a matter of law fairly (sic) for the Court, and I submit that no expert testimony is admissible here on the question of the practice or procedure in the courts, or on the question of the meaning of the word conviction.

• • • • • • •

[fol. 127] Mr. Smith: We are not asking for that. We are asking you to take judicial notice as to what the law is with respect to a conviction in Massachusetts. Now, there is only one of three ways we can get evidence before your Honor about that, and that is either by your taking judicial notice, by listening to expert testimony, and by citations, as a matter of evidence, not as a matter of——

The Court: I will let you give me citations, and I will make the decision. I have got to make the decision.

Mr. Smith: Then may I give you the citations now, by way of evidence and not by way of argument on the law of the case?

The Court: No, I won't take it by way of evidence. I will take it only in the form of a brief. And that applies to you, Mr. Medalie; I am not making a special ruling for one and another ruling for the other. I am not going to take citations in the form of evidence. I will take them in a brief.

• • • • • • •

The Court: Do I understand, Mr. Smith, that with the admission of that record, and the motion to incorporate the records covered by this document before me which has been marked by my direction Petitioner's Exhibit 1, that outside of that you haven't any evidence to present at the present time?

Mr. Smith: Yes, Your Honor.

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The Court: All right, I will hear you tomorrow morning at ten o'clock. How much time will you require for argument?

Mr. Smith: I should like to have it appear for the record that what I intend to use, what your Honor has termed as argument, will be the presentation of citations which I [fols. 128-135] feel properly belong in the realm of evidence. And I should think that the whole matter shouldn't take any more than about three-quarters of an hour, in my opinion.

[fol. 136] In United States Court of Appeals

Argument and Submission—June 2, 1954

Thereafter, to wit on June 2, 1954, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Wood-

bury and Honorable John P. Hartigan, Circuit Judges, sitting.

[File endorsement omitted.]

[fol. 137] IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4832

ANTHONY PINO, Petitioner, Appellant,

v.

HENRY NICOLIS, District Director of Immigration and Naturalization, Respondent, Appellee.

No. 4833

SAME v. SAME

Appeals From the United States District Court for the District of Massachusetts.

[119 F. Supp. 122]

Before Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges

Reuben Goodman, with whom Paul T. Smith and Manuel Katz were on brief, for appellant.

Jerome Medalie, Assistant U. S. Attorney, with whom Anthony Julian, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT—Filed August 2, 1954

MAGRUDER, *Chief Judge*. Anthony Pino, an alien who has been ordered to be deported pursuant to § 241(a)(4) of the Immigration and Nationality Act (66 Stat. 204), filed in the district court a petition for a writ of habeas corpus. The district court issued the writ, held a hearing thereon, and on February 1, 1954, entered an order discharging the writ

[fol. 138] and dismissing the petition with an accompanying opinion coming to the conclusion, as had the Board of Immigration Appeals, that the warrant of deportation had been lawfully issued by the Special Inquiry Officer. 119 F.Supp. 122. Pino's appeal from this order of the district court is docketed in this court as No. 4832. Also, Pino filed in the district court a motion to be enlarged on bail pending appeal. Upon denial of this motion on February 2, 1954, Pino took an appeal (No. 4833) from the order of denial. On March 11, 1954, this court denied an interlocutory motion by Pino asking us to enlarge him on bail pending appeal. 211 F.2d 393. Subsequently, by administrative action of the Attorney General, Pino was admitted to bail pending these appellate proceedings, with the result that the appeal in No. 4833 has become moot and will be dismissed on that ground. However, we still have before us the main appeal in No. 4832, involving the validity of the warrant of deportation.

Appellant was born in Italy, and was brought to this country in 1908 when he was one year old. He has maintained a residence here since that time, but has not become an American citizen.

It appears from the record that a warrant of arrest was issued against Pino on April 20, 1938, in an earlier atttempt to deport him under § 19 of the Immigration Act of 1917 (39 Stat. 889) in that, after passage of that Act, the alien had, as alleged, been sentenced more than once to imprisonment for a term of one year or more "because of conviction in this country of any crime involving moral turpitude, committed at any time after entry". This deportation proceeding was based upon (1) a conviction in Massachusetts by verdict of a petit jury on March 20, 1928, for carnal abuse of a female child, for which offense Pino was sentenced on March 29, 1928, to a term of five years and a day in the Massachusetts Reformatory in Concord, and (2) a [fol. 139] conviction in Massachusetts on January 6, 1938, following a plea of guilty to the offense of breaking and entering a building in the daytime with intent to commit a felony therein, for which offense he was sentenced to a term of from three to four years in the Massachusetts State Prison, and (3) a conviction in Massachusetts on January 6,

1938, following a plea of guilty to the offense of illegal possession of burglary tools, for which offense he was sentenced to a term of from three to four years in Massachusetts State Prison, to be served consecutively after expiration of the sentence for breaking and entering. For some undisclosed reason, the deportation proceeding dragged on, until finally, on September 6, 1949, Pino obtained from the Acting Governor of Massachusetts and Council a full pardon for each of the two offenses listed in (2) and (3) above. Under § 19 of the Immigration Act of 1917, those pardons cut the ground from under the earlier deportation proceeding; and on October 26, 1950, an Assistant Commissioner of the Immigration and Naturalization Service ordered the cancellation of the warrant of arrest dated April 20, 1938.

Subsequently, on June 27, 1952, Congress passed the Immigration and Nationality Act (66 Stat. 163) making important changes in the requirements for deportation of aliens.

The presently pending deportation proceeding was initiated by a warrant of arrest issued January 5, 1953, and served a few days thereafter. Deportation was sought pursuant to the provisions of § 241(a)(4) of the Immigration and Nationality Act, reading as follows (66 Stat. 204):

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . .
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either [fol. 140] sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; . . ."

The proceeding was based upon two distinct convictions for crimes involving moral turpitude, *viz.*, (1) the aforementioned conviction in Massachusetts by verdict of a petit jury on March 20, 1928, for carnal abuse of a female child, for which offense Pino was sentenced on March 29, 1928,

to a term of five years and a day in the Massachusetts Reformatory, and (2) a conviction of petty larceny, contrary to Mass. G.L., c. 266, § 30, upon a finding of guilty on January 4, 1949, after trial in the Third District Court of Eastern Middlesex, for which offense the court originally sentenced Pino to a term of one year in the House of Correction. The execution of this sentence was subsequently suspended by the court, and ultimately the sentence was revoked and the case placed on file, without, however, revoking the finding of guilty. Since the sentence of imprisonment was revoked and Pino served no time for this offense, it could not be used as a basis for deportation in the earlier proceeding under the Immigration Act of 1917. See *United States ex rel. Robinson* v. *Day*, 51 F. 2d 1022 (C.A. 2d, 1931). But, as above appears, § 241(a)(4) of the 1952 Act provides for the deportation of aliens convicted, after entry, of two crimes involving moral turpitude "regardless of whether confined therefor".

There is no doubt that the requirements of § 241(a)(4) have been satisfied so far as concerns the offense of carnal abuse of a female child. This offense is defined in Mass. G.L., c. 265, § 23, under the caption "Rape of Child." There [fol. 141] was introduced in the present proceeding a certified copy of a record in the Superior Court for Suffolk County, Mass., from which the following appears: On January 9, 1928, the grand jury handed down an indictment charging that Pino on November 17, 1927, made an assault upon a certain female child under the age of sixteen years with the intent unlawfully and carnally to know and abuse her; and did then and there unlawfully and carnally know and abuse her. Pino pleaded not guilty. After trial, a petit jury returned a verdict of guilty on March 20, 1928. On March 29, 1928, the Superior Court imposed upon Pino a sentence of commitment to the Massachusetts Reformatory at Concord for the term of five years and one day. Though appellant makes some half-hearted contention to the contrary, it cannot now be questioned that this offense properly belongs in the category of crimes involving moral turpitude. *Bendel* v. *Nagle*, 17 F. 2d 719 (C.A. 9th, 1927); *Ng Sui Wing* v. *United States*, 42 F. 2d 755 (C.A. 7th, 1931). See also *Commonwealth* v. *Roosnell*, 143 Mass. 32 (1886);

Commonwealth v. *Murphy*, 165 Mass. 66 (1895); *Commonwealth* v. *Hackett*, 170 Mass. 194 (1898).

That brings us to one of the more seriously contested points in the case, whether the record in the Third District Court of Eastern Middlesex, duly authenticated by the testimony of the First Assistant Clerk of that court, compels the conclusion, as a matter of law, that within the meaning of § 241(a)(4) of the Immigration and Nationality Act Pino stands "convicted" in that court of a "crime involving moral turpitude". From this record we derive the following: On December 8, 1948, a complaint was filed in the Third District Court of Eastern Middlesex charging that Pino did steal twelve golf balls of value less than one hundred dollars, the property of R. W. Shattuck Co., Inc. Pino pleaded not guilty. On December 23, 1948, the District Court, sitting without a jury of course, found the [fol. 142] defendant guilty and forthwith imposed a sentence of imprisonment for one year in the House of Correction. On December 27, 1948, Pino took an appeal to the Superior Court, which appeal, if it had been persisted in, would have entitled Pino to a trial *de novo* before a jury in the Superior Court. However, on December 28, 1948, this appeal was withdrawn by leave of court. On the same day a motion for a new trial was filed in the District Court and allowed by that court, which thereupon revoked its previous finding of guilty and continued the case for retrial. On January 4, 1949, after a new trial, the District Court again found defendant guilty and again imposed a sentence of one year's imprisonment in the House of Correction. On January 10, 1949, Pino appealed from this second judgment of conviction. But on January 28, 1949, this second appeal was withdrawn by Pino by leave of court and on the same day the District Court either expressly or impliedly reimposed the original sentence of one year's imprisonment in the House of Correction, and suspended the execution of the same to January 30, 1950. Though the formal entries do not so state, we gather from the testimony of the Assistant Clerk that this was automatically equivalent to putting the defendant on probation for one year beginning January 28, 1949. There was a further entry made on that date, "appeal waived". Apparently the probation report

after Pino had served out his probationary period was satisfactory to the court, for as of January 30, 1950, appears the entry "Sentence revoked. On file." The Assistant Clerk testified that this was the usual procedure in the court, in that "where a man is given a suspended sentence and put on probation, he serves out his probation and the case is then filed".

Thus it appears that twice, after the District Court found Pino guilty and imposed sentence upon him, Pino had the opportunity to have a trial *de novo* in the Superior Court, [fol. 143] but in each instance he withdrew his appeal by leave of court. If Pino could have appealed again to the Superior Court when the reimposed or reinstated sentence of imprisonment was suspended by the District Court on January 28, 1949, and the defendant put on probation, such appeal seems to have been expressly waived. At any rate, Pino's acquiescence in the suspended sentence and acceptance of probation precluded a subsequent appeal. *Mariano* v. *Judge of District Court*, 243 Mass. 90 (1922); *Renado* v. *Lummus*, 205 Mass. 155 (1910). It is clear, also, that at that point Pino stood "convicted" in the District Court under any suggested definition of the word; and under § 241(a)(4) of the Immigration and Nationality Act, it is of no consequence that he was not actually imprisoned for the offense.

But appellant asserts that this record of conviction was in effect obliterated by the entry on January 30, 1950: "Sentence revoked. On file." In *Marks* v. *Wentworth*, 199 Mass. 44, 45 (1908), the Supreme Judicial Court discussed this procedure of placing a case on file:

> "It has long been the practice in this Commonwealth for a court, with the consent of the defendant, after a verdict or plea of guilty in a criminal case, when for good cause it seems best not to impose sentence immediately, to place the case on file. This practice has been recognized by statute and approved by this court. The effect of it is fully stated in *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133. See also *Commonwealth* v. *Foster*, 122 Mass. 317, 323; *Commonwealth* v. *Maloney*, 145 Mass. 205. The case then stands on the records of the court, and although usually no further

proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it. But the case cannot [fol. 144] properly be placed on file without the consent of the defendant. He has a right to have it finally disposed of, without unreasonable delay, so that he will not be liable for an indefinite period to be brought into the court and subjected to punishment. Although this practice formerly prevailed only in the higher courts, it was extended by statute to the police, district and municipal courts. R.L. c. 160, § 39. St. 1893, c. 396, § 54. But when the statute gave to these courts authority to place complaints on file, it did not authorize such a disposition of a case against the objection of the defendant."

What was the District Court to do on January 30, 1950? The period had expired within which the execution of the sentence of imprisonment was suspended by prior order. Unless something was done about it, the sentence, no longer suspended, was subject to be carried into execution. If at that date the District Court was finally satisfied that the object of the one-year's probation had been accomplished, in such a way as not to require imprisonment of the defendant either for his own reformation or in the interests of the public, the logical thing to have done would have been to revoke the prison sentence and to dismiss the case, which final disposition the District Court had power to make. See *Marks* v. *Wentworth,* supra. But such action would not have been equivalent to wiping out the record of conviction in the District Court. The finding of guilty was unrevoked, and the order of dismissal in the circumstances would have been no more than a judicial determination that the ends of justice had been served by the period of probationary discipline and surveillance—"an authorized mode of mild and ambulatory punishment"—which had been imposed for the offense of which the defendant had been found guilty. See *Korematsu* v. *United States,* 319 U.S. 432, 435 (1943). [fol. 145] But when the District Court on January 30, 1950, revoked the sentence, the court chose to place the case on file instead of finally disposing of it by dismissing it. As indicated in *Marks* v. *Wentworth,* supra, the District Court

could properly have put the case on file only with the consent of the defendant. Apparently the defendant acquiesced in this action of the District Court. At least, there is nothing in the record to suggest dissent. After his apparent acquiescence for over four years, we do not believe that Pino could successfully invoke in the Superior Court the extraordinary remedy of a writ of mandamus to compel the District Court to impose sentence or otherwise make a final disposition of the case. Such a remedy was obtained in *Marks* v. *Wentworth,* supra, but by a defendant who had strenuously registered his dissent at the very time the court, after a finding of guilty, placed the case on file.

The case thus being in the on-file status, technically the district court postponed indefinitely a determination whether the ends of justice required the imposition of a prison sentence for the offense of which Pino had been found guilty. Theoretically, the case could later be taken from the files and a prison sentence imposed. In the most unlikely event that this should happen, Pino asserts that he would be entitled to appeal from the sentence so imposed, and thus obtain a trial *de novo* before a jury in the Superior Court, which trial might result in an ultimate acquittal of the offense of petty larceny. Therefore Pino contends that the present posture of the case, in its on-file status, is so lacking in finality that on the record in the District Court it cannot be said that Pino stands "convicted" in the Massachusetts courts of the crime of petty larceny. Whether Pino could appeal from such a sentence newly imposed after the case was taken from the files we do not know for sure. For present purposes, we shall assume that he could, for we think it makes no difference anyway.

[fol. 146] In these deportation cases, where a state crime is involved, it is commonly said that the federal courts are governed by the laws of the state in determining whether the alien was "convicted" of such crime. *United States* v. *Smith,* 41 F. 2d 707, 708 (C.A. 7th, 1930). In a certain limited sense, this statement is accurate. We have to look to the law and procedure of the state to interpret what happened in the state courts. For instance, if a finding of guilty has been made by a court without a jury, the law of the state determines whether the court is authorized to

make such finding of fact. But examination of the Massachusetts decisions on the meaning of the word "convicted" shows that the word may be given a certain meaning in one context, and something quite different in another. Thus in the leading case of *Commonwealth* v. *Lockwood*, 109 Mass. 323 (1872), the governor and council had issued a pardon to a person after he had been found guilty by verdict of the jury and before sentence had been imposed and while exceptions allowed by the trial judge were pending in the Supreme Judicial Court. It was held that the pardon was effective notwithstanding a provision in the constitution of the state that "no charter of pardon, granted by the governor, with advice of the council, *before conviction*, shall avail the party pleading the same". (Italics added.) The court pointed out that the ordinary legal meaning of "conviction" when used to designate a particular stage of a criminal prosecution triable by a jury "is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." (P. 325) In *Munkley* v. *Hoyt*, 179 Mass. 108 (1901), the court was dealing with a statutory provision authorizing the Board of Registration in Phar- [fol. 147] macy after hearing to suspend or revoke the registration of a registered pharmacist, "but the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after *conviction* by a court of competent jurisdiction." (Italics added.) In this case a registered pharmacist had pleaded guilty to a complaint in the Superior Court charging him with unlawful sale of intoxicating liquor and thereupon that court had ordered the complaint placed on file. It was held that this was a "conviction" within the meaning of the foregoing statutory provision. On the other hand, in *Commonwealth* v. *Gorham*, 99 Mass. 420 (1868), applying a statute providing that criminal "conviction" of a witness might be shown to affect his credibility, the Supreme Judicial Court held that in this context the legislature meant to require not merely a verdict of guilty but a final judg-

ment of the court determining guilt. See also *Forcier* v. *Hopkins*, 329 Mass. 668 (1953). And in *Commonwealth* v. *Kiley*, 150 Mass. 325 (1889), it was held that a statute providing that "the conviction by a court of competent jurisdiction" of a liquor licensee for violating any of the provisions of the laws relating to intoxicating liquors "shall of itself make the license of said person void", implied a final judgment of the court.

It is obvious that the Massachusetts courts have never been called upon to interpret the meaning of the word "convicted" in the context of a deportation case, where the word is used in an Act of Congress setting forth the requirements for deportability of aliens. In this context, in the interest of a uniform application of the federal statute, the meaning of the word "convicted" is a federal question to be determined upon due consideration of the policy which §241(a)(4) of the Immigration and Nationality Act was designed to serve.

[fol. 148] The object, of course, is to get rid of aliens with socially undesirable criminal traits. Once in a while, an innocent man may be convicted. But Congress did not impose upon the Attorney General the impossible administrative burden of ascertaining *de novo* whether the alien in fact was guilty of the offenses of which he had been legally convicted. If there stand against the alien two or more records of conviction in courts of competent jurisdiction of crimes involving moral turpitude, the assumption of the Act is that the alien was guilty of the offenses in question and that his social undesirability has thus been sufficiently established for purposes of deportation.

But since legal determination of guilt is made the statutory test of deportability, we should seek an interpretation of the word "convicted" in §241(a)(4) as will ensure that this legal determination has been made with reasonable certainty and finality. Perhaps a formal plea of guilty to a complaint or indictment, accepted by the court, is a conviction in this sense, even before the court takes any action on the matter of sentence. See *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); *United States* v. *Scarlata*, F. 2d (C.A. 3d, July 19, 1954). We do not have that problem here, for Pino pleaded not guilty to the charge of petty

larceny. The government contends that upon a plea of not guilty, the statutory requirement of being "convicted" is satisfied, without more, when a verdict of guilty is returned by the jury, or a finding of guilty is made by the court, as the case may be. We are not prepared to assent to this proposition. A verdict or finding of guilty is usually followed by a motion for a new trial which, as we know, and as was so in Pino's petty larceny case, frequently results in the award of a new trial. So, too, appeals from conviction in the trial court often result in the award of a new trial. Judicial action on the motion for a new trial made immediately after a verdict or finding of guilt, and judicial action [fol. 149] in the normal routine appellate review provided by law, are part of the ordinary processes of re-examination, the outcome of which perhaps ought to be awaited before it can be said, with sufficient certainty and definiteness, that the state has "convicted" the alien of crime.

However, if the government must stay its action of deportation to await the outcome of these routine processes of judicial re-examination, that does not mean that the government has to wait forever, until every remote possibility of ultimate upset of a conviction has been extinguished. It is a possibility that, long after conviction in the ordinary sense, new evidence may be discovered, and the case reopened on that ground and a new trial granted. In Massachusetts, many years after verdict of guilty, imposition of sentence, and even affirmance on appeal, it may be possible to obtain the setting aside of a conviction on the ground that it was procured in derogation of the accused's fundamental constitutional rights, by the procedure of a writ of error issued out of the Supreme Judicial Court. See *Lindsey* v. *Commonwealth,* Mass. , 116 N.E. 2d 691 (1954); *McGarty* v. *Commonwealth,* 326 Mass. 413 (1950); *Allen* v. *Commonwealth,* 324 Mass. 558 (1949). In other states, a long-standing conviction may, in subsequent habeas corpus proceedings, be judicially determined to have been illegal. The mere possibility of such ultimate upsets does not defeat deportation of the convicted alien; though of course if, prior to deportation, he has succeeded in one of these ways in upsetting his conviction it can no longer serve as a basis for deportation.

With these general considerations in mind, we are satisfield that on the record in the Third Judicial Court of Eastern Middlesex, as above recited, Pino stands "convicted" of the crime of petty larceny within the meaning of § 401(a)(4). Pino was tried, found guilty, and sentenced to imprisonment. Upon a routine motion for a new trial, [fol. 150] the District Court vacated its finding of guilt, tried him a second time, again found him guilty and reimposed the sentence of imprisonment. Twice Pino appealed to the Superior Court, but in each instance he withdrew his appeal and voluntarily relinquished the opportunity to test his innocence in the appellate courts of the Commonwealth. Execution of the sentence was suspended for a year, during which time we gather that Pino was on probation. At the end of the year the sentence was revoked and the case placed on file in the District Court. Placing the case on file was not equivalent to a revocation of the judicial determination of Pino's guilt, which for deportation purposes is the principal measure of his lack of social desirability. The action of placing the case on file only meant that for the time being the District Court was satisfied that the interests of justice did not require the imposition of a prison term upon Pino for the offense of which he stood convicted; but, as above pointed out, it is of no consequence under the wording of § 241(a)(4) that Pino did not actually serve time for the offense. Though theoretically it may be possible for the District Court at some time in the future to take the case from the files and make a final disposition of it, if we take account of the ordinary modes of procedure in the local courts it must be concluded that there is every probability that, once a case is placed on file, it will remain in that status undisturbed and probably forgotten. This petty larceny case against Pino has already remained on file four and a half years. Pino cannot as a matter of right have it removed from that on-file status so as to have the outstanding record of conviction obliterated.

In fact, after the present deportation proceeding was commenced, Pino filed in the District Court on February 4, 1953, a motion for a new trial on the ground of newly discovered evidence. This motion was denied by the District Court on December 23, 1953, whether on the merits

[fol. 151] or on the ground that the motion was untimely does not appear. Of course, if the District Court, pending the deportation proceedings, had granted this long-delayed motion for a new trial and had vacated the finding of guilt, then the prior conviction of this particular crime could no longer have served as a basis for deportation. And while this motion for a new trial was pending undisposed-of by the District Court, with the possibility that it might eventuate in the ultimate establishment of Pino's innocence, Pino might have applied to the District Director for a stay of deportation to await the outcome, but the granting of such a stay would have been a matter of administrative discretion. See 8 C.F.R. (1952 Rev.) § 243.3(b).

Appellant has made no contention in this court that the crime of larceny is not properly to be classified in the general category of crimes involving moral turpitude. It is well-settled that, in ordinary acceptation, the crime of larceny, whether grand or petty, is a crime involving moral turpitude. *Blumen* v. *Haff*, 78 F. 2d 833 (C.A. 9th, 1935); *Tillinghast* v. *Edmead*, 31 F. 2d 81 (C.A. 1st, 1929). We shall say a word about that. There is some force in the comment by Judge Anderson, dissenting, in *Tillinghast* v. *Edmead*, supra (at p. 84): "It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude." Indeed, it is possible to conceive of circumstances under which almost any crime might be committed from the purest of motives, motives, however, which the law does not accept as a defense. But here again, with considerations of administrative workability in mind, Congress has painted with a broad brush. If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude neither the administrative officials in a deportation proceeding nor the courts on review [fol. 152] of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extentuating factors which might relieve the offender of the stigma of moral obliqnity. See *United States ex rel. Robinson* v. *Day*, 51 F. 2d 1022 (C.A. 2d 1931). Congress

did not overlook the possibility of extenuating circumstances in the particular case, for it prescribed in § 241(b) of the Immigration and Nationality Act of 1952 that the provisions of § 241 (a) (4) respecting the deportation of an alien convicted of a crime or crimes "shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not to be deported . . ." (66 Stat. 208) A similar provision was found in § 19 of the Immigration Act of 1917. (39 Stat. 889-90)

While appellant relied primarily upon the argument that, on the record in the Third District Court of Eastern Middlesex, he does not stand "convicted" of the crime of larceny, he also urges that he is not deportable under § 241(a)(4) of the Immigration and Nationality Act because that section should be given a strictly prospective construction rendering it inapplicable to crimes and convictions which occurred prior to the day when the Act took effect in 1952. This contention, as observed in the government's brief, makes the unlikely assumption that Congress intended in 1952 to exempt those aliens from deportation who had already revealed the identical socially undesirable criminal traits which Congress now believes to be a sufficient basis to warrant the withdrawal of the privilege of continued residence [fol. 153] in this country, and that Congress was concerned merely with those aliens who at some time in the future might display those characteristics. It would also follow that if an alien prior to 1952 had been convicted of a most heinous crime of moral turpitude, and after the effective date of the 1952 Act had been convicted of one other crime involving moral turpitude, he could not be deported under § 241(a)(4) because the section requires, under the suggested interpretation, a minimum of two convictions after the effective date of the Act. We think the statutory language clearly negatives this reading. Section 241(a) provides that any alien in the United States shall be deported who "(4) . . . *at any time after entry* is convicted of two

crimes involving moral turpitude . . ." (Italics added.) This is to be contrasted with the language of § 241(a)(3), "hereafter, within five years after entry, . . ." and of § 241 (a) (11), ". . . hereafter at any time after entry . . ." It is also significant that in the comparable provision of the predecessor Act, § 19 of the Act of 1917 (39 Stat. 889), Congress provided for the deportation of ". . . any alien who is *hereafter* sentenced to imprisonment for a term of one year or more . . . or who is *hereafter* sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry" (italics added); but Congress chose to omit the key word "hereafter" in § 241(a)(4) of the 1952 revised statute. Furthermore, § 241(d) lays to rest any possible doubt on the matter. That subsection reads: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all liens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) *that the facts, by reason of which any such* [fol. 154] *alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.*" (Italics added.)

Certain additional points of a procedural nature are advanced by appellant. He says he was deprived of procedural due process in that the Special Inquiry Officer introduced in evidence a long police record involving Pino, and also certain FBI reports covering Pino's continuous brushes with the criminal law. Admittedly these were hearsay documents irrelevant to the legal issues involved in the charges on which deportation was sought. Their introduction before a jury trying contested issues of fact would no doubt have been prejudicial, for a reading of the documents tends to leave one with the impression that over the years Pino has shown himself to be a particularly undesirable alien, if ever there was one. But if, as we have held as a matter of law, the authenticated and unchallenged records in the Massachusetts courts reveal that the alien, since his entry into the United States, has been convicted of two crimes involving moral turpitude, how can we conclude that the Special Inquiry Officer was in error in ordering

Pino's deportation on the ground that such deportation was required by § 241(a)(4) of the Act? If the case went back for another administrative hearing, the same result would be inevitable. Other alleged procedural errors are strictly in the nature of grasping at straws and we find no sufficient merit or plausibility in any of them to warrant special discussion.

The order of the District Court is affirmed.

[fol. 155] In United States Court of Appeals

Judgment—August 2, 1954

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court: (S.) Roger A. Stinchfield, Clerk.

[fol. 156] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 157] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 333

ANTHONY PINO, Petitioner,

vs.

HENRY NICOLLS, District Director of Immigration and Naturalization

ORDER ALLOWING CERTIORARI—Filed November 8, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. .

ANTHONY PINO,
Petitioner,

v.

HENRY NICOLLS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

The petitioner, Anthony Pino, by his attorneys, prays that a writ of certiorari issue to review the judgment entered in this case on August 2, 1954, by the United States Court of Appeals for the First Circuit.

Opinions Below.

The decision and order of the Special Inquiry Officer (R.* p. A64) and the decision of the Board of Immigration Appeals (R. p. A75) are unreported. The opinion of the

*R. refers to the Appendix Record in the court below filed with this petition, pursuant to Rule 21 of the Revised Rules of this court.

District Court (R. p. A104) is reported at 119 F. Supp. 122. The opinion of the Court of Appeals (Appendix A, p. 23) has not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 2, 1954. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

Questions Presented.

I. Whether an alien was "convicted" within the purview of section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204, where he was granted probation and given a year's suspended sentence, after having been found guilty of stealing twelve golf balls by a local Massachusetts court of limited jurisdiction, and where, after a satisfactory probation, the sentence was revoked and the case placed on file, *i.e.*, continued generally.

II. Whether section 241(a)(4) of the Immigration and Nationality Act should be given a retrospective construction, making it applicable where the "conviction" on which deportation is based occurred prior to the effective date of the Act.

III. Whether the theft of a dozen golf balls is a crime "involving moral turpitude" and whether that phrase is a sufficient criterion for deportability.

IV. Whether a deportation order based on proceedings which violated the procedural requirements of the Immigration and Nationality Act and the Regulations issued thereunder, as well as the requirements of procedural due process, should have been upheld by the court below be-

cause the substantive grounds on which the order was challenged raised only questions of law decided by the court below adversely to the petitioner.

Constitutional Provisions, Statutes and Regulations.

1. Section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204, provides:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> . . . . . .
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; . . ."

2. Also involved and set out in Appendix B are the Fifth Amendment to the United States Constitution and a portion of section 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U.S.C. sec. 1252(b); section 405(a) of the Immigration and Nationality Act, 66 Stat. 280; portions of section 242.53(b) and section 242.61 of the Administrative Regulations Implementing the Immigration and Nationality Act, 8 C.F.R. 1952 revision.

3. Appendix B also includes other provisions and rules less directly involved to which reference is made.

Statement of the Case.

In this case the petitioner challenges the validity of an order of deportation. The petitioner was brought to the United States about forty-six years ago when he was about a year old. He has lived here continuously since that time and is married to an American citizen (R. pp. A64, A2).

In 1926, when the petitioner was twenty years old, he was convicted in Massachusetts of violating General Laws (Ter. Ed.) c. 265, sec. 23, prohibiting carnal knowledge of a girl under sixteen years of age. In December, 1948, the petitioner was charged with the theft of a dozen golf balls in the Third District Court of Eastern Middlesex. This is a local Massachusetts court of limited jurisdiction. From this court a defendant has a right of appeal to the Superior Court, where he is given a trial *de novo* before a jury (see Opinion of court below, Appendix A, pp. 27, 28). The petitioner pleaded not guilty, but was found guilty on January 4, 1949. The court subsequently on January 8, 1949, granted him probation, suspending a one year's sentence in the House of Correction to January 30, 1950. On that date it appeared to the court that the probation had been satisfactory and the court therefore revoked the sentence and placed the case on file (R. pp. A58, A102-103; see Opinion of court below, Appendix A, pp. 27, 28), *i.e.*, continued it generally (R. p. A78).

Based on these two charges, both of which occurred more than five years after the petitioner's entry into the United States, a Special Inquiry Officer of the Immigration and Naturalization Service on March 23, 1953, issued the order of deportation under section 241(a)(4) of the Immigration and Nationality Act.

This order was issued after proceedings begun on or about January 5, 1952, when a warrant was issued for the petitioner's arrest. Relevant parts of these proceedings

are more fully described in the argument regarding their validity.

The deportation order of March 23, 1953, was affirmed by the Board of Immigration Appeals on August 11, 1953. The petitioner surrendered on December 18, 1953, pursuant to notification to report for deportation, and on the same day filed a petition for habeas corpus in the United States District Court for the District of Massachusetts, pursuant to 28 U.S.C. sec. 2241(a). The District Court issued the writ, but after a hearing on the merits discharged the writ and dismissed the petition on February 1, 1954. The petitioner appealed to the Court of Appeals for the First Circuit, which on August 2, 1954, affirmed the order of the District Court.

Argument.

I. The holding of the Court of Appeals that the finding of guilt without sentence satisfied the meaning of "convicted" in section 241(a)(4) is inconsistent with the law of Massachusetts and Federal decisions in analogous situations. It is not in harmony with other Congressional enactments and is inconsistent with the intent of Congress, as indicated in the Immigration and Nationality Act itself and its legislative history.

A. *Applicable Law.* The court below refused to follow the law of Massachusetts in assessing the seriousness and effect of the state action in the golf ball case—to what extent it connotes punishment and is the type of state action from which disabilities flow. This is contrary to the holding of the Board of Immigration Appeals (R. p. A77) in this very case and is inconsistent with *United States ex. rel. Freislinger on Behalf of Kappel* v. *Smith*, 41 F. (2d)

707-708 (7th Cir.) and *United States ex rel. Cerami* v. *Uhl*, 78 F. (2d) 698 (2d Cir.), where the court analyzed the New York law in determining that an order of confinement to the New York House of Refuge was not a "sentence" within the Immigration Act of February 5, 1917. Cf. *Perkins* v. *United States ex rel. Malesevic*, 99 F. (2d) 255.

Furthermore, the holding of the court below is not in accord with the principle of *United States* v. *Di Re*, 332 U.S. 581, in which this court held that the state law was the applicable standard to test actions by state officers in making arrests without warrants.

B. *Massachusetts Law.* Had the court below followed Massachusetts law, it would have been constrained to find that the finding without sentence was not a conviction effective to impose collateral disabilities on the defendant or deprive him of rights. *Commonwealth* v. *Kiley*, 150 Mass. 325. *Commonwealth* v. *Hersey*, 324 Mass. 196, at 205. *Attorney General* v. *Pelletier*, 240 Mass. 264, at 310-311. *People* v. *Schaller*, 229 N.Y.S. 492. See also *Renado* v. *Lummus*, 205 Mass. 155. *Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90, at 92.

The Fifth Report of the Judicial Council of Massachusetts, Public Document No. 144, reprinted in 15 Mass. Law Quarterly (2), December, 1929, p. 29 *et seq.*, contains a detailed discussion of the procedure here involved and concludes that it is not a "final conviction."

Commonwealth v. *Lockwood*, 109 Mass. 323, and *Munkley* v. *Hoyt*, 179 Mass. 108, relied on by the Board of Immigration Appeals and the District Court, are not to the contrary. In neither case was a "conviction" being used to impose disabilities. See *People* v. *Fabian*, 192 N.Y. 443, at 450.

The fact that the petitioner was placed on probation and the probation was satisfactory is itself inconsistent with

the imposition of disabilities. "Probation looks to reformation and not to a final goal of punishment." *Marks* v. *Wentworth,* 199 Mass. 44, at 46, cited in 2 Attorney General's Survey of Release Procedures, p. 1. See also Chute, "The Development of Probation in the United States" (Glueck, "Probation and Criminal Justice," pp. 228-229), *Mariano* v. *Judge of District Court of Central Berkshire, supra,* and Mass. General Laws (Ter. Ed.) c. 276, sec. 87, which permits the Superior Court to place a defendant on probation even before a finding of guilt.

In the Sixth Annual Report of the Massachusetts Commission on Probation, 1914 (p. 17), Public Document No. 85, cited in Grinnell, "Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System," 2 Mass. Law Quarterly (6), 591, at 594, it is stated:

> "The probation service deals with human material that has not been stamped as criminal. It undertakes to build out of this a respect for law and correct personal conduct before the difficulty of that task has been heightened by penal experience."

In this case we have, therefore, a record indicating that the court has refused to stamp the petitioner as criminal, but rather revoked the sentence on the basis of a satisfactory probation. It is submitted that this is not the type of court action which entails the imposition of so serious a penalty as deportation.

C. *Federal Law.* The court below in fashioning a general meaning for the word "convicted" ignored decisions going back to 1833, holding that, where a greater penalty is provided for a second or subsequent "conviction," the first "conviction" must include a sentence. *United States*

v. *Thompson*, Fed. Cas. No. 16,485, 4 Cranch C.C. 335 (1833). *Schooley* v. *United States*, 4 F. (2d) 767 (8th Cir.). *Singer* v. *United States*, 278 F. 415 (3d Cir.). *United States* v. *Stoddart*, 11 F. (2d) 827 (Dist. Ct. E.D. Pa.). See also Rule 32(b) of the Rules of Criminal Procedure (327 U.S. 854-855).

The meaning of the word "conviction" adopted by the court below is inconsistent with the meaning adopted by *United States ex rel. Cassetta* v. *Commissioner of Immigration*, 56 F. (2d) 826 (2d Cir.), in interpreting the Narcotic Drugs Import and Export Act, May 26, 1922, c. 202, 42 Stat. 596, providing for deportation of an alien "convicted" of certain narcotic violations. The court there held that actual imprisonment was required.

Even in a naturalization proceeding where the issue is merely the petitioner's good moral character, it has been held that, where the Government chooses to rely on a record of conviction to show bad moral character, the record must contain a final judgment. *In re Ringnalda*, 48 F. Supp. 975. Cf. *In the Matter of F.*, 1 I. & N. Dec. 343.

Thus, too, Congress in passing section 20(b)(3), (4) and (5) of the Alien Registration Act of 1940 (incorporated in section 19(b) of the Immigration Act of 1917, 54 Stat. 671-673), making deportable aliens who "shall have been convicted" of various crimes, intended that that phrase should include actual imprisonment since it went on to provide that no alien deportable under those provisions "shall be deported until the termination of his imprisonment or the entry of an order releasing him on probation or parole."*

*The reference to release on probation, as well as parole, is required to cover such states as Ohio, where "probation" may be granted even after sentence has begun (1 Release Procedures, p. 888), and Louisiana, where probation and parole are confused in the statutes (1 Attorney General's Survey of Release Procedures, p. 439).

Historically, moreover, disabilities flowed from the attaint—the final sentence—rather than the verdict, which Blackstone, in describing the various steps in a proceeding, terms the "conviction." 4 Blackstone, 361. But this distinction had apparently been blurred even in Blackstone's time (4 Blackstone, 381), and various statutes imposing disabilities use the word "conviction" alone. The word has therefore been interpreted to include the judgment or sentence from which the disabilities flowed historically. See also the common-law authorities cited in *United States* v. *Thompson*.

The court below attributes to a probation order and a general continuance the serious consequence of a sentence. But neither a general continuance (*Miller* v. *Aderhold*, 288 U.S. 206, 208) nor probation is the final judgment which includes a sentence (*Berman* v. *United States*, 302 U.S. 211). Probation does not connote a sentence and the punishment inherent in a sentence. "Probation is concerned with rehabilitation," *Berman* v. *United States, supra*, *Korematsu* v. *United States*, 319 U.S. 432, at 435, *Roberts* v. *United States*, 320 U.S. 264, 272, and the dissenting opinion which (reaching the constitutional question that the majority did not have to consider) held that the imposition of a sentence after a period of probation had been served did not "offend the safeguard of the Fifth Amendment against double punishment" (p. 276).

It seems inconsistent with the purposes of the Probation Act to make an alien deportable on the basis of proceedings in which a court has decided that he merits the opportunity for rehabilitation and does not require punishment.*

*Probation in Massachusetts as set out above resembles a sentence even less than under Federal law. It requires consent of the defendant (*Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90) and can be granted by a Superior Court even before a finding of guilt. G.L. (Ter. Ed.) c. 276, sec. 87. Cf.

Nor is *Korematsu* v. *United States* to the contrary. It merely holds that a probation order is a final decision for appeal purposes. Cf. *Stack* v. *Boyle*, concurring opinion, 342 U.S. 1, at 12.

D. *The Immigration and Nationality Act.* The Act itself indicates that a sentence is required for a conviction. The word "convicted" in section 241(a)(4) must be construed in the light of section 241(b) (8 U.S.C. sec. 1251(b)), which provides:

> "The provisions of subsections (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court *sentencing* such alien for such crime shall make, at the time of first *imposing judgment or passing sentence,* or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported . . ." (Emphasis ours.)

It is obviously contemplated that the "alien convicted of a crime" must be sentenced "for such crime." In *United States ex rel. Cassetta* v. *Commissioner of Immigration, supra,* exactly this interpretative technique is used. *Cf.* section 242(h), which seems to contemplate a sentence of imprisonment actually served.

E. *Legislative History.* Prior to this Act, it was accepted that a sentence actually served was required for deportation. A suspended sentence was not sufficient. *Robinson* v. *Day,* 51 F. (2d) 1022 (R. p. A63). Nowhere,

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King v. *Commonwealth,* 246 Mass. 57, at 60, in which the court said: "The time during which the defendant was on probation was in no sense a part of the term of his sentence."

so far as we could find, is there the slightest intimation in the legislative history that the changes made in Section 241(a)(4) were intended for the first time to subject an alien to deportation on the basis of a suspended sentence or a mere finding of guilt with or without probation. Certainly so drastic a change would have been mentioned.

Nor is the phrase "regardless of whether confined therefor" intended to accomplish this result. The most obvious answer is that this phrase was intended to make a sentence carrying a fine a basis for deportation. But the legislative history indicates that the phrase was used to solve an entirely different problem. In Senate Report No. 1515, 81st Congress, 2d Session, at p. 391, it appears that the Committee on the Judiciary was concerned with modifying the former requirement that the alien be "sentenced more than once," which was interpreted in *Fong Haw Tan* v. *Phelan,* 333 U.S. 6, to mean sentences on two different occasions. See 66 Harvard Law Review, 685.

Accordingly, it provided for two convictions "regardless of whether confined therefor"—that is, regardless of whether confined for each offense separately. Thus concurrent sentences or a single sentence on two counts where the two counts do not arise out of a single scheme of criminal misconduct (*cf.* Rule 8(a), Rules of Criminal Procedure) are now sufficient for deportation.

House Report No. 1365, 82d Congress, 2d Session, U.S. Code Congressional and Administrative News, 1952, p. 1653, at 1715, indicates that the phrase "regardless of whether confined therefor," instead of "sentenced more than once," was used to accomplish just this. It lists as deportable:

> "Aliens who, within five years of entry, are convicted of a crime involving moral turpitude and sentenced to confinement for a year or more; or who, at

> any time after entry, are convicted of two such crimes, whether or not confined. *Thus, an alien who at any time after entry is convicted of two crimes involving moral turpitude is deportable, regardless of whether confined therefor, whereas under existing law the alien must have been sentenced more than once to a term of a year or more because of such convictions.*" (Emphasis ours.)

Thus, too, in the first part of section 241(a)(4), where Congress inserted after "sentenced" the words "or confined," Congress did not intend to change the meaning of "sentenced" as there used (*Robinson* v. *Day, supra*). It appears that this insertion was made to make clear that indeterminate sentences were sufficient for deportation. Here too it seems clear that actual confinement is contemplated. Thus Senate Report No. 1515, p. 391, states:

> "deportation should be required in the case of a single conviction only if the conviction occurred within five years after entry and resulted in confinement in a prison or corrective institution for a year or more."

On the basis of this analysis a sentence to confinement is necessary in both parts of section 241(a)(4), and this is asserted by Mr. Walter Besterman, legislative assistant of the House Committee on the Judiciary, in a commentary on the Act printed with Title 8 of the United States Code Annotated (p. 61).

It may also be significant that Senate Report No. 1515, at p. 71, states that the old immigration law imposes deportation for "conviction of a crime." The Judiciary Committee is obviously here using the word "conviction" to include a sentence actually served.

The interpretation by the court below, particularly when coupled with a retrospective interpretation of the section, will, we daresay, resurrect numberless cases long forgotten in which aliens had been granted probation and then probation had been terminated, as in the Federal courts, or in which the proceedings after a satisfactory probation were continued indefinitely, as in our case. No appeals were taken because the stakes were not high, and because in many states an appeal does not lie from a probation order. (Even in the Federal courts there was great doubt on this question before *Korematsu* v. *United States.*) No attempts were made to get recommendations against deportation as provided by section 19(a) of the Act of 1917, predecessor to section 241(d) of this Act, since the proceedings could not be made grounds for deportation.

It is submitted that the opinion of the court below regarding the meaning of "conviction" which the Board of Immigration Appeals has characterized as "not free from difficulty" (R. p. A78) and which is one of first impression so far as section 241(a)(4) of the Immigration and Nationality Act is concerned is inconsistent with the approach of this court in *Barber* v. *Gonzales,* 347 U.S. 637, and *Fong Haw Tan* v. *Phelan,* 333 U.S. 6.

II. The retrospective effect given to subsection 241(a)(4) is inconsistent with the interpretation by this court of similar language and with Congressional intent. *Kessler* v. *Strecker,* 307 U.S. 22. Cf. *Wallace* v. *Cutten,* 298 U.S. 229. *Kessler* v. *Strecker,* moreover, alerted Congress to this specific problem and directly resulted in the amendment of the immigration laws. See *Bridges* v. *Wixon,* 326 U.S. 135.

Eichenlaub v. *Shaughnessy,* 338 U.S. 521, also indicates that a proper method of accomplishing retrospectivity is

to use the words "have been or may hereafter be convicted," and this language is used in subsection 241(a)(17).

It seems difficult to believe that, if Congress had intended a retrospective interpretation, it would not have used the language of subsection 241(a)(6) or 241(a)(7)—"is or at any time after entry has been"—or the language of subsection 241(a)(5) and subsection 241(a)(11)—"has been convicted"—or even subsection 241(a)(14), (15) and (16)—"shall have been convicted"—or the language of subsection 241(a)(17). In those sections the use of the past tense is understandable, since Congress was merely continuing in effect existing law. But in section 241(a)(4) Congress had made some changes—more or less drastic, depending upon whether our interpretation or the court's is accepted. Prospective operation is understandable in this subsection.

The court below points to the omission of the word "hereafter" in subsection 241(a)(4). "Is," however, when used in other subsections alone, without "hereafter," is still prospective. Thus in section 241(a)(11) "is, or hereafter at any time after entry has been, a narcotic drug addict" was, as the respondent conceded in the court below, intended to operate prospectively only. See House Report No. 1365, 82d Congress, 2d Session, U.S. Code Congressional and Administrative News, p. 1716; Senate Report No. 1137, 82d Congress, 2d Session, p. 22. Here, "is" standing alone in the first part of the clause cannot mean "was heretofore."

The court below calls it an unlikely assumption that Congress would make certain future conduct the basis for deportation without making deportable similar conduct in the past. But that is exactly what Congress did in section 241(a)(11). Aliens who after the effective date of the

Act have become drug addicts are deportable, even after they are cured, but aliens who became drug addicts before the effective date of the Act and were cured before that date are not deportable.

Nor is section 241(d) applicable. That section applies "except as otherwise specifically provided"; and Congress here deliberately, after *Kessler* v. *Strecker*, uses the present tense where it could easily have used the past, in a section where there are a multitude of tense distinctions and where "is" standing alone in section 241(a)(11) is used prospectively. If section 241(d) can operate to modify subsection 241(a)(4), it is a virtual invitation for the executive and judiciary to modify the subsections of section 241(a), picking and choosing as to which will operate retrospectively and which prospectively without reference to the language used. This, it is submitted, the Constitution itself forbids. *Wallace* v. *Cutten*, 298 U.S. 229.

Moreover, the primary purpose of section 241(d) seems to be to make sure that the Act covers aliens who entered before its effective date. The first part of section 241(d) was included in section 19(b) of the Immigration Act of 1917. The addition of the second part on which the court below relies is not mentioned anywhere in the legislative history among the changes made. The inference would be that the second part was merely meant to reinforce the first part. Thus in section 241(a)(2), making deportable an alien who had entered the United States without inspection, the second part makes certain that the "without inspection" will not be read prospectively, and thus make the entry read prospectively.

There are also other ambiguities which section 241(d) may have been enacted to cope with. Thus, apart from section 241(d) it is not clear that the past tenses, *e.g.*, section 241(a)(5) "has been convicted," refer to convictions

before the effective date of the Act as well as before the deportation proceedings commenced.

Moreover, the interpretations here suggested harmonize section 241(d) with section 405(a), which provides in substance that, as to all "liabilities" or "acts" or "matters" before the effective date of the Immigration and Nationality Act, the old law shall apply unless "otherwise specifically provided." Thus, if the petitioner in the future is sentenced to more than one year for a single crime involving moral turpitude, he will be deportable under section 19(a) of the Immigration Act of February 5, 1917.

The legislative history also indicates that Congress intended section 241(a)(4) to apply prospectively. It is of some significance that in both the House and the Senate Reports (Senate Report No. 1137, 82d Congress, 2d Session, p. 21, and House Report No. 1365, U.S. Code Congressional and Administrative News, 1952, p. 1715) the discussions of section 241(a)(4) use the present tense, never slipping into the past tense as would have been natural. Moreover, Representative Walter, who presented the bill in the House, indicates that the only new retrospective provision in the bill is section 241(a)(2) and that the other provisions which operate retrospectively were merely continuations of the old law. On the floor of the House (98 Congressional Record, pp. 4301-4302, April 23, 1952, 82d Congress, 2d Session) he read a protest against the bill from the C.I.O. which stated:

> "By abolishing existing statutes of limitation and by creating and making retroactive new grounds for deportation HR 5678 jeopardizes the status of the resident foreign born including immigrants whose admission into the United States under the Displaced Persons Act was authorized by Congress and supported by the C.I.O."

Representative Walter commented as follows:

> "Of course, HR 5678 does not do that. The Internal Security Act does and the Internal Security Act is a part of the law of the land today. It is restated, that is true, in this bill. This is because we are trying to put together for the first time since 1802 all the statutes relating to immigration and naturalization. It does, however, cover the situation where an alien succeeds in hiding in the United States. If that man is successful for five years his status can be adjusted. Your committee felt this was wrong. We felt that there should not be a premium placed on the ability of an alien to conceal himself. Under the provisions of this new bill where such a situation exists that alien is deportable."

III. The court below holds that the theft of a dozen golf balls is a crime involving moral turpitude and adopts as a criterion that the crime "in its general nature is one which in common usage" would be so classified. It does not use the criterion suggested by the Government in *Jordan* v. *De George*, 341 U.S. 223—whether it is "a serious penal offense"—(see dissenting opinion, p. 235)—though that seems no more an objective criterion than the formulation by the court below.

The majority in *Jordan* v. *De George* relies on fraud as the touchstone—"the contaminating component." But even if some such "contaminating component" can be isolated in larceny, the Massachusetts Legislature has cut out of larceny a class of crimes—those involving theft of $100 or less—which it has made a misdemeanor rather than a felony. Obviously it felt that such petty larceny did not carry the degree of moral obliquity or contamination that larceny generally connotes. Judge Anderson in his dis-

senting opinion in *Tillinghast* v. *Edmead*, 31 F. (2d) 81, said that petty larceny is one of those crimes the facts of which require examination before a decision can be made as to whether it involves moral turpitude. This seems more realistic, but it still leaves us without any objective criterion.

This lack of an objective criterion will be much more serious if the view of the court below is adopted that a sentence to imprisonment is no longer required under the Immigration and Nationality Act. Previously, whatever moral turpitude might mean, a crime on which deportation could be based had to be of such a nature as to impel a court actually to impose a sentence of at least one year's imprisonment. *Robinson* v. *Day*, 51 F. (2d) 1022. But on the interpretation of "convicted" by the court below the crimes hereafter coming before the courts for analysis in deportation proceedings will include a host of minor delinquencies which trial courts have not even felt to require punishment.

Moreover, on the view that section 241(a)(4) of the Immigration and Nationality Act operates retrospectively an additional group of "convictions" will be made the basis for deportation. As to these "convictions" the recommendations of the trial court against deportation under section 19(a) of the Act of February 5, 1917, the predecessor to section 241(b) can have no application since these so-called "convictions" were not grounds for deportation at the time they occurred.

IV. Because the court below reached the conclusion that the alien was deportable as a matter of law, it refused to consider that the deportation order is based on proceedings which violated the procedural requirements of the Act and Regulations, as well as the requirements of

procedural due process. But the question before the court was whether the order of deportation was valid, not whether the petitioner was deportable. The petitioner has the right to have that latter question determined by the Special Inquiry Officer (8 C.F.R. sec. 242.61) acting as a judicial, not an investigating officer (sec. 242(b) of the Act).

The Special Inquiry Officer did not, in fact, consider he was acting in a judicial capacity. For example, he asked (R. p. A17) how many times the petitioner had been arrested. On objection by counsel he stated:

> "A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act."

The Special Inquiry Officer placed in the record Federal Bureau of Investigation reports (Exhibits 4 and 4(a), R. pp. A45, A50) containing "investigative leads" (R. p. A25), and overruled objections to these reports (R. pp. A24, A33) on the ground that they were "cumulative evidence" (R. p. A25). He also admitted Exhibit 3, a report of the petitioner's criminal record (R. pp. A26, A43). This the Board of Immigration Appeals felt important enough to append to its decision (R. pp. A77, A93).

The Special Inquiry Officer states (R. p. A70) that he considered in his decision "the transcript of hearings and the exhibits made a part of the record." These exhibits were obviously irrelevant and the grossest hearsay. Apart from the violations of the petitioner's right to a fair hearing under the Fifth Amendment, the admission and consideration of these exhibits violated the Regulations which provide that the Special Inquiry Officer "shall conduct a

fair and impartial hearing" (8 C.F.R. sec. 242.53(b)), and "shall exclude from the record any evidence that is irrelevant, immaterial or unduly repetitious" (sec. 242.53(b)), and section 242(b) of the Act providing that "the alien shall have a reasonable opportunity to examine the evidence against him and to cross-examine witnesses presented by the Government," an injunction against hearsay evidence.

Nor is it an answer to say that the questions involved in this proceeding were primarily questions of law. Such questions also require unbiased consideration. This is recognized by every judge of an appellate court deciding only questions of law who has at one time or another disqualified himself. It is obviously impossible to tell the degree to which the Special Inquiry Officer was influenced in his decision by these exhibits, termed by the District Court (R. p. A113) "of a highly incendiary character."

Nor was the result reached by the court below inevitably the result the Special Inquiry Officer had to reach. Indeed, the Special Inquiry Officer seems to have taken a somewhat different view of the applicable law from that which the court took. He seems to have relied on Massachusetts law (R. p. A67), as did the Board of Immigration Appeal (R. p. A77), rather than on a general Federal law. An unbiased judicial analysis of Massachusetts law, we submit, would have yielded a finding that the petitioner was not deportable.

Apart from the question of procedural due process, the decision of the court below to refrain from inquiring into the procedural basis of the deportation order is inconsistent with the assumption in *Bilokumsky* v. *Tod*, 263 U.S. 149, "that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." See also *Bridges* v. *Wixon*, 326 U.S. 135; *United States ex rel.*

Accardi v. *Shaughnessy*, 347 U.S. 260, and *Handlovitz* v. *Adcock*, 80 F. Supp. 425 (D.C. E.D. Mich.).

The Senate Judiciary Committee too has indicated its opinion that the court will participate in the administration of the Immigration and Nationality Act through active enforcement of the Attorney General's regulations. In Senate Report No. 1515, p. 624, it is stated with reference to regulations issued by the Attorney General:

> "These regulations have the force and effect of law and are binding upon the immigration authorities. Their non-observance might invalidate the entire hearing even though no actual prejudice to the alien is shown."

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB SPIEGEL,
1 State Street,
Boston, Massachusetts.

Of Counsel:
PAUL T. SMITH,
REUBEN GOODMAN,
MANUEL KATZ.

APPENDIX A.

Opinion of the Court of Appeals for the First Circuit.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 4832. ANTHONY PINO,
PETITIONER, APPELLANT,
v.
HENRY NICOLLS, District Director of Immigration and Naturalization,
RESPONDENT, APPELLEE.

No. 4833. SAME *v.* SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

[119 F. Supp. 122]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Reuben Goodman, with whom *Paul T. Smith* and *Manuel Katz* were on brief, for appellant.

Jerome Medalie, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

August 2, 1954.

MAGRUDER, *Chief Judge*. Anthony Pino, an alien who has been ordered to be deported pursuant to § 241(a)(4) of the Immigration and Nationality Act (66 Stat. 204), filed in the district court a petition for a writ of habeas corpus. The district court issued the writ, held a hearing thereon, and on February 1, 1954, entered an order discharging the writ

and dismissing the petition, with an accompanying opinion coming to the conclusion, as had the Board of Immigration Appeals, that the warrant of deportation had been lawfully issued by the Special Inquiry Officer. 119 F.Supp. 122. Pino's appeal from this order of the district court is docketed in this court as No. 4832. Also, Pino filed in the district court a motion to be enlarged on bail pending appeal. Upon denial of this motion on February 2, 1954, Pino took an appeal (No. 4833) from the order of denial. On March 11, 1954, this court denied an interlocutory motion by Pino asking us to enlarge him on bail pending appeal. 211 F.2d 393. Subsequently, by administrative action of the Attorney General, Pino was admitted to bail pending these appellate proceedings, with the result that the appeal in No. 4833 has become moot and will be dismissed on that ground. However, we still have before us the main appeal in No. 4832, involving the validity of the warrant of deportation.

Appellant was born in Italy, and was brought to this country in 1908 when he was one year old. He has maintained a residence here since that time, but has not become an American citizen.

It appears from the record that a warrant of arrest was issued against Pino on April 20, 1938, in an earlier attempt to deport him under § 19 of the Immigration Act of 1917 (39 Stat. 889) in that, after passage of that Act, the alien had, as alleged, been sentenced more than once to imprisonment for a term of one year or more "because of conviction in this country of any crime involving moral turpitude, committed at any time after entry". This deportation proceeding was based upon (1) a conviction in Massachusetts by verdict of a petit jury on March 20, 1928, for carnal abuse of a female child, for which offense Pino was sentenced on March 29, 1928, to a term of five years and a day in the Massachusetts Reformatory in Concord, and (2) a

conviction in Massachusetts on January 6, 1938, following a plea of guilty to the offense of breaking and entering a building in the daytime with intent to commit a felony therein, for which offense he was sentenced to a term of from three to four years in the Massachusetts State Prison, and (3) a conviction in Massachusetts on January 6, 1938, following a plea of guilty to the offense of illegal possession of burglary tools, for which offense he was sentenced to a term of from three to four years in Massachusetts State Prison, to be served consecutively after expiration of the sentence for breaking and entering. For some undisclosed reason, the deportation proceeding dragged on, until finally, on September 6, 1949, Pino obtained from the Acting Governor of Massachusetts and Council a full pardon for each of the two offenses listed in (2) and (3) above. Under § 19 of the Immigration Act of 1917, those pardons cut the ground from under the earlier deportation proceeding; and on October 26, 1950, an Assistant Commissioner of the Immigration and Naturalization Service ordered the cancellation of the warrant of arrest dated April 20, 1938.

Subsequently, on June 27, 1952, Congress passed the Immigration and Nationality Act (66 Stat. 163) making important changes in the requirements for deportation of aliens.

The presently pending deportation proceeding was initiated by a warrant of arrest issued January 5, 1953, and served a few days thereafter. Deportation was sought pursuant to the provisions of § 241(a)(4) of the Immigration and Nationality Act, reading as follows (66 Stat. 204):

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . .
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either

> sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; . . . ."

The proceeding was based upon two distinct convictions for crimes involving moral turpitude, *viz.*, (1) the aforementioned conviction in Massachusetts by verdict of a petit jury on March 20, 1928, for carnal abuse of a female child, for which offense Pino was sentenced on March 29, 1928, to a term of five years and a day in the Massachusetts Reformatory, and (2) a conviction of petty larceny, contrary to Mass. G.L., c. 266, § 30, upon a finding of guilty on January 4, 1949, after trial in the Third District Court of Eastern Middlesex, for which offense the court originally sentenced Pino to a term of one year in the House of Correction. The execution of this sentence was subsequently suspended by the court, and ultimately the sentence was revoked and the case placed on file, without, however, revoking the finding of guilty. Since the sentence of imprisonment was revoked and Pino served no time for this offense, it could not be used as a basis for deportation in the earlier proceeding under the Immigration Act of 1917. See *United States ex rel. Robinson* v. *Day*, 51 F.2d 1022 (C.A. 2d, 1931). But, as above appears, § 241(a)(4) of the 1952 Act provides for the deportation of aliens convicted, after entry, of two crimes involving moral turpitude "regardless of whether confined therefor".

There is no doubt that the requirements of § 241(a)(4) have been satisfied so far as concerns the offense of carnal abuse of a female child. This offense is defined in Mass. G.L., c. 265, § 23, under the caption "Rape of Child." There

was introduced in the present proceeding a certified copy of a record in the Superior Court for Suffolk County, Mass., from which the following appears: On January 9, 1928, the grand jury handed down an indictment charging that Pino on November 17, 1927, made an assault upon a certain female child under the age of sixteen years with the intent unlawfully and carnally to know and abuse her; and did then and there unlawfully and carnally know and abuse her. Pino pleaded not guilty. After trial, a petit jury returned a verdict of guilty on March 20, 1928. On March 29, 1928, the Superior Court imposed upon Pino a sentence of commitment to the Massachusetts Reformatory at Concord for the term of five years and one day. Though appellant makes some half-hearted contention to the contrary, it cannot now be questioned that this offense properly belongs in the category of crimes involving moral turpitude. *Bendel* v. *Nagle*, 17 F.2d 719 (C.A. 9th, 1927); *Ng Sui Wing* v. *United States*, 42 F.2d 755 (C.A. 7th, 1931). See also *Commonwealth* v. *Roosnell*, 143 Mass. 32 (1886); *Commonwealth* v. *Murphy*, 165 Mass. 66 (1895); *Commonwealth* v. *Hackett*, 170 Mass. 194 (1898).

That brings us to one of the more seriously contested points in the case, whether the record in the Third District Court of Eastern Middlesex, duly authenticated by the testimony of the First Assistant Clerk of that court, compels the conclusion, as a matter of law, that within the meaning of § 241(a)(4) of the Immigration and Nationality Act Pino stands "convicted" in that court of a "crime involving moral turpitude". From this record we derive the following: On December 8, 1948, a complaint was filed in the Third District Court of Eastern Middlesex charging that Pino did steal twelve golf balls of value less than one hundred dollars, the property of R. W. Shattuck Co., Inc. Pino pleaded not guilty. On December 23, 1948, the District Court, sitting without a jury of course, found the

defendant guilty and forthwith imposed a sentence of imprisonment for one year in the House of Correction. On December 27, 1948, Pino took an appeal to the Superior Court, which appeal, if it had been persisted in, would have entitled Pino to a trial *de novo* before a jury in the Superior Court. However, on December 28, 1948, this appeal was withdrawn by leave of court. On the same day a motion for a new trial was filed in the District Court and allowed by that court, which thereupon revoked its previous finding of guilty and continued the case for retrial. On January 4, 1949, after a new trial, the District Court again found defendant guilty and again imposed a sentence of one year's imprisonment in the House of Correction. On January 10, 1949, Pino appealed from this second judgment of conviction. But on January 28, 1949, this second appeal was withdrawn by Pino by leave of court and on the same day the District Court either expressly or impliedly reimposed the original sentence of one year's imprisonment in the House of Correction, and suspended the execution of the same to January 30, 1950. Though the formal entries do not so state, we gather from the testimony of the Assistant Clerk that this was automatically equivalent to putting the defendant on probation for one year beginning January 28, 1949. There was a further entry made on that date, "appeal waived". Apparently the probation report after Pino had served out his probationary period was satisfactory to the court, for as of January 30, 1950, appears the entry "Sentence revoked. On file." The Assistant Clerk testified that this was the usual procedure in the court, in that "where a man is given a suspended sentence and put on probation, he serves out his probation and the case is then filed".

Thus it appears that twice, after the District Court found Pino guilty and imposed sentence upon him, Pino had the opportunity to have a trial *de novo* in the Superior Court,

but in each instance he withdrew his appeal by leave of court. If Pino could have appealed again to the Superior Court when the reimposed or reinstated sentence of imprisonment was suspended by the District Court on January 28, 1949, and the defendant put on probation, such appeal seems to have been expressly waived At any rate, Pino's acquiescence in the suspended sentence and acceptance of probation precluded a subsequent appeal. *Mariano* v. *Judge of District Court,* 243 Mass. 90 (1922); *Renado* v. *Lummus,* 205 Mass. 155 (1910). It is clear, also, that at that point Pino stood "convicted" in the District Court under any suggested definition of the word; and under § 241(a)(4) of the Immigration and Nationality Act, it is of no consequence that he was not actually imprisoned for the offense.

But appellant asserts that this record of conviction was in effect obliterated by the entry on January 30, 1950: "Sentence revoked. On file." In *Marks* v. *Wentworth,* 199 Mass. 44, 45 (1908), the Supreme Judicial Court discussed this procedure of placing a case on file:

> "It has long been the practice in this Commonwealth for a court, with the consent of the defendant, after a verdict or plea of guilty in a criminal case, when for good cause it seems best not to impose sentence immediately, to place the case on file. This practice has been recognized by statute and approved by this court. The effect of it is fully stated in *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133. See also *Commonwealth* v. *Foster,* 122 Mass. 317, 323; *Commonwealth* v. *Maloney,* 145 Mass. 205. The case then stands on the records of the court, and although usually no further proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it. But the case cannot

> properly be placed on file without the consent of the defendant. He has a right to have it finally disposed of, without unreasonable delay, so that he will not be liable for an indefinite period to be brought into the court and subjected to punishment. Although this practice formerly prevailed only in the higher courts, it was extended by statute to the police, district and municipal courts. R.L. c. 160, § 39. St. 1893, c. 396, § 54. But when the statute gave to these courts authority to place complaints on file, it did not authorize such a disposition of a case against the objection of the defendant."

What was the District Court to do on January 30, 1950? The period had expired within which the execution of the sentence of imprisonment was suspended by prior order. Unless something was done about it, the sentence, no longer suspended, was subject to be carried into execution. If at that date the District Court was finally satisfied that the object of the one-year's probation had been accomplished, in such a way as not to require imprisonment of the defendant either for his own reformation or in the interests of the public, the logical thing to have done would have been to revoke the prison sentence and to dismiss the case, which final disposition the District Court had power to make. See *Marks* v. *Wentworth,* supra. But such action would not have been equivalent to wiping out the record of conviction in the District Court. The finding of guilty was unrevoked, and the order of dismissal in the circumstances would have been no more than a judicial determination that the ends of justice had been served by the period of probationary discipline and surveillance—"an authorized mode of mild and ambulatory punishment"—which had been imposed for the offense of which the defendant had been found guilty. See *Korematsu* v. *United States,* 319 U.S. 432, 435 (1943).

But when the District Court on January 30, 1950, revoked the sentence, the court chose to place the case on file instead of finally disposing of it by dismissing it. As indicated in *Marks* v. *Wentworth*, supra, the District Court could properly have put the case on file only with the consent of the defendant. Apparently the defendant acquiesced in this action of the District Court. At least, there is nothing in the record to suggest dissent. After his apparent acquiescence for over four years, we do not believe that Pino could successfully invoke in the Superior Court the extraordinary remedy of a writ of mandamus to compel the District Court to impose sentence or otherwise make a final disposition of the case. Such a remedy was obtained in *Marks* v. *Wentworth*, supra, but by a defendant who had strenuously registered his dissent at the very time the court, after a finding of guilty, placed the case on file.

The case thus being in the on-file status, technically the district court postponed indefinitely a determination whether the ends of justice required the imposition of a prison sentence for the offense of which Pino had been found guilty. Theoretically, the case could later be taken from the files and a prison sentence imposed. In the most unlikely event that this should happen, Pino asserts that he would be entitled to appeal from the sentence so imposed, and thus obtain a trial *de novo* before a jury in the Superior Court, which trial might result in an ultimate acquittal of the offense of petty larceny. Therefore Pino contends that the present posture of the case, in its on-file status, is so lacking in finality that on the record in the District Court it cannot be said that Pino stands "convicted" in the Massachusetts courts of the crime of petty larceny. Whether Pino could appeal from such a sentence newly imposed after the case was taken from the files we do not know for sure. For present purposes, we shall assume that he could, for we think it makes no difference anyway.

In these deportation cases, where a state crime is involved, it is commonly said that the federal courts are governed by the laws of the state in determining whether the alien was "convicted" of such crime. *United States* v. *Smith*, 41 F.2d 707, 708 (C.A. 7th, 1930). In a certain limited sense, this statement is accurate. We have to look to the law and procedure of the state to interpret what happened in the state courts. For instance, if a finding of guilty has been made by a court without a jury, the law of the state determines whether the court is authorized to make such finding of fact. But examination of the Massachusetts decisions on the meaning of the word "convicted" shows that the word may be given a certain meaning in one context, and something quite different in another. Thus in the leading case of *Commonwealth* v. *Lockwood*, 109 Mass. 323 (1872), the governor and council had issued a pardon to a person after he had been found guilty by verdict of the jury and before sentence had been imposed and while exceptions allowed by the trial judge were pending in the Supreme Judicial Court. It was held that the pardon was effective notwithstanding a provision in the constitution of the state that "no charter of pardon, granted by the governor, with advice of the council, *before conviction*, shall avail the party pleading the same". (Italics added.) The court pointed out that the ordinary legal meaning of "conviction" when used to designate a particular stage of a criminal prosecution triable by a jury "is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." (P. 325) In *Munkley* v. *Hoyt*, 179 Mass. 108 (1901), the court was dealing with a statutory provision authorizing the Board of Registration in Phar-

macy after hearing to suspend or revoke the registration of a registered pharmacist, "but the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after *conviction* by a court of competent jurisdiction." (Italics added.) In this case a registered pharmacist had pleaded guilty to a complaint in the Superior Court charging him with unlawful sale of intoxicating liquor and thereupon that court had ordered the complaint placed on file. It was held that this was a "conviction" within the meaning of the foregoing statutory provision. On the other hand, in *Commonwealth* v. *Gorham*, 99 Mass. 420 (1868), applying a statute providing that criminal "conviction" of a witness might be shown to affect his credibility, the Supreme Judicial Court held that in this context the legislature meant to require not merely a verdict of guilty but a final judgment of the court determining guilt. See also *Forcier* v. *Hopkins*, 329 Mass. 668 (1953). And in *Commonwealth* v. *Kiley*, 150 Mass. 325 (1889), it was held that a statute providing that "the conviction by a court of competent jurisdiction" of a liquor licensee for violating any of the provisions of the laws relating to intoxicating liquors "shall of itself make the license of said person void", implied a final judgment of the court.

It is obvious that the Massachusetts courts have never been called upon to interpret the meaning of the word "convicted" in the context of a deportation case, where the word is used in an Act of Congress setting forth the requirements for deportability of aliens. In this context, in the interest of a uniform application of the federal statute, the meaning of the word "convicted" is a federal question to be determined upon due consideration of the policy which § 241(a)(4) of the Immigration and Nationality Act was designed to serve.

The object, of course, is to get rid of aliens with socially undesirable criminal traits. Once in a while, an innocent man may be convicted. But Congress did not impose upon the Attorney General the impossible administrative burden of ascertaining *de novo* whether the alien in fact was guilty of the offenses of which he had been legally convicted. If there stand against the alien two or more records of conviction in courts of competent jurisdiction of crimes involving moral turpitude, the assumption of the Act is that the alien was guilty of the offenses in question and that his social undesirability has thus been sufficiently established for purposes of deportation.

But since legal determination of guilt is made the statutory test of deportability, we should seek an interpretation of the word "convicted" in § 241(a)(4) as will ensure that this legal determination has been made with reasonable certainty and finality. Perhaps a formal plea of guilty to a complaint or indictment, accepted by the court, is a conviction in this sense, even before the court takes any action on the matter of sentence. See *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); *United States* v. *Scarlata*, F.2d (C.A. 3d, July 19, 1954). We do not have that problem here, for Pino pleaded not guilty to the charge of petty larceny. The government contends that upon a plea of not guilty, the statutory requirement of being "convicted" is satisfied, without more, when a verdict of guilty is returned by the jury, or a finding of guilty is made by the court, as the case may be. We are not prepared to assent to this proposition. A verdict or finding of guilty is usually followed by a motion for a new trial which, as we know, and as was so in Pino's petty larceny case, frequently results in the award of a new trial. So, too, appeals from conviction in the trial court often result in the award of a new trial. Judicial action on the motion for a new trial made immediately after verdict or finding of guilt, and judicial action

in the normal routine appellate review provided by law, are part of the ordinary processes of re-examination, the outcome of which perhaps ought to be awaited before it can be said, with sufficient certainty and definiteness, that the state has "convicted" the alien of crime.

However, if the government must stay its action of deportation to await the outcome of these routine processes of judicial re-examination, that does not mean that the government has to wait forever, until every remote possibility of ultimate upset of a conviction has been extinguished. It is a possibility that, long after conviction in the ordinary sense, new evidence may be discovered, and the case reopened on that ground and a new trial granted. In Massachusetts, many years after verdict of guilty, imposition of sentence, and even affirmance on appeal, it may be possible to obtain the setting aside of a conviction on the ground that it was procured in derogation of the accused's fundamental constitutional rights, by the procedure of a writ of error issued out of the Supreme Judicial Court. See *Lindsey* v. *Commonwealth*, Mass. , 116 N.E.2d 691 (1954); *McGarty* v. *Commonwealth*, 326 Mass. 413 (1950); *Allen* v. *Commonwealth*, 324 Mass. 558 (1949). In other states, a long-standing conviction may, in subsequent habeas corpus proceedings, be judicially determined to have been illegal. The mere possibility of such ultimate upsets does not defeat deportation of the convicted alien; though of course if, prior to deportation, he has succeeded in one of these ways in upsetting his conviction, it can no longer serve as a basis for deportation.

With these general considerations in mind, we are satisfied that on the record in the Third Judicial Court of Eastern Middlesex, as above recited, Pino stands "convicted" of the crime of petty larceny within the meaning of § 401(a)(4). Pino was tried, found guilty, and sentenced to imprisonment. Upon a routine motion for a new trial,

the District Court vacated its finding of guilt, tried him a second time, again found him guilty and reimposed the sentence of imprisonment. Twice Pino appealed to the Superior Court, but in each instance he withdrew his appeal and voluntarily relinquished the opportunity to test his innocence in the appellate courts of the Commonwealth. Execution of the sentence was suspended for a year, during which time we gather that Pino was on probation. At the end of the year the sentence was revoked and the case placed on file in the District Court. Placing the case on file was not equivalent to a revocation of the judicial determination of Pino's guilt, which for deportation purposes is the principal measure of his lack of social desirability. The action of placing the case on file only meant that for the time being the District Court was satisfied that the interests of justice did not require the imposition of a prison term upon Pino for the offense of which he stood convicted; but, as above pointed out, it is of no consequence under the wording of § 241(a)(4) that Pino did not actually serve time for the offense. Though theoretically it may be possible for the District Court at some time in the future to take the case from the files and make a final disposition of it, if we take account of the ordinary modes of procedure in the local courts it must be concluded that there is every probability that, once a case is placed on file, it will remain in that status undisturbed and probably forgotten. This petty larceny case against Pino has already remained on file four and a half years. Pino cannot as a matter of right have it removed from that on-file status so as to have the outstanding record of conviction obliterated.

In fact, after the present deportation proceeding was commenced, Pino filed in the District Court on February 4, 1953, a motion for a new trial on the ground of newly discovered evidence. This motion was denied by the District Court on December 23, 1953, whether on the merits

or on the ground that the motion was untimely does not appear. Of course, if the District Court, pending the deportation proceedings, had granted this long-delayed motion for a new trial and had vacated the finding of guilt, then the prior conviction of this particular crime could no longer have served as a basis for deportation. And while this motion for a new trial was pending undisposed-of by the District Court, with the possibility that it might eventuate in the ultimate establishment of Pino's innocence, Pino might have applied to the District Director for a stay of deportation to await the outcome, but the granting of such a stay would have been a matter of administrative discretion. See 8 C.F.R. (1952 Rev.) § 243.3(b).

Appellant has made no contention in this court that the crime of larceny is not properly to be classified in the general category of crimes involving moral turpitude. It is well-settled that, in ordinary acceptation, the crime of larceny, whether grand or petty, is a crime involving moral turpitude. *Blumen* v. *Haff*, 78 F.2d 833 (C.A. 9th, 1935); *Tillinghast* v. *Edmead*, 31 F.2d 81 (C.A. 1st, 1929). We shall say a word about that. There is some force in the comment by Judge Anderson, dissenting, in *Tillinghast* v. *Edmead*, supra (at p. 84): "It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude." Indeed, it is possible to conceive of circumstances under which almost any crime might be committed from the purest of motives, motives, however, which the law does not accept as a defense. But here again, with considerations of administrative workability in mind, Congress has painted with a broad brush. If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review

of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity. See *United States ex rel. Robinson* v. *Day*, 51 F.2d 1022 (C.A.2d, 1931). Congress did not overlook the possibility of extenuating circumstances in the particular case, for it prescribed in § 241(b) of the Immigration and Nationality Act of 1952 that the provisions of § 241(a)(4) respecting the deportation of an alien convicted of a crime or crimes "shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not to be deported . . . ." (66 Stat. 208) A similar provision was found in § 19 of the Immigration Act of 1917. (39 Stat. 889-90)

While appellant relied primarily upon the argument that, on the record in the Third District Court of Eastern Middlesex, he does not stand "convicted" of the crime of larceny, he also urges that he is not deportable under § 241(a)(4) of the Immigration and Nationality Act because that section should be given a strictly prospective construction rendering it inapplicable to crimes and convictions which occurred prior to the day when the Act took effect in 1952. This contention, as observed in the government's brief, makes the unlikely assumption that Congress intended in 1952 to exempt those aliens from deportation who had already revealed the identical socially undesirable criminal traits which Congress now believes to be a sufficient basis to warrant the withdrawal of the privilege of continued residence

in this country, and that Congress was concerned merely with those aliens who at some time in the future might display those characteristics. It would also follow that if an alien prior to 1952 had been convicted of a most heinous crime of moral turpitude, and after the effective date of the 1952 Act had been convicted of one other crime involving moral turpitude, he could not be deported under § 241(a)(4) because the section requires, under the suggested interpretation, a minimum of two convictions after the effective date of the Act. We think the statutory language clearly negatives this reading. Section 241(a) provides that any alien in the United States shall be deported who "(4) . . . *at any time after entry* is convicted of two crimes involving moral turpitude . . . ." (Italics added.) This is to be contrasted with the language of § 241(a)(3), "hereafter, within five years after entry, . . . " and of § 241(a)(11), " . . . hereafter at any time after entry . . . ." It is also significant that in the comparable provision of the predecessor Act, § 19 of the Act of 1917 (39 Stat. 889), Congress provided for the deportation of ". . . any alien who is *hereafter* sentenced to imprisonment for a term of one year or more . . . or who is *hereafter* sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry" (italics added); but Congress chose to omit the key word "hereafter" in § 241(a)(4) of the 1952 revised statute. Furthermore, § 241(d) lays to rest any possible doubt on the matter. That subsection reads: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) *that the facts, by reason of which any such*

alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." (Italics added.)

Certain additional points of a procedural nature are advanced by appellant. He says he was deprived of procedural due process in that the Special Inquiry Officer introduced in evidence a long police record involving Pino, and also certain FBI reports covering Pino's continuous brushes with the criminal law. Admittedly these were hearsay documents irrelevant to the legal issues involved in the charges on which deportation was sought. Their introduction before a jury trying contested issues of fact would no doubt have been prejudicial, for a reading of the documents tends to leave one with the impression that over the years Pino has shown himself to be a particularly undesirable alien, if ever there was one. But if, as we have held as a matter of law, the authenticated and unchallenged records in the Massachusetts courts reveal that the alien, since his entry into the United States, has been convicted of two crimes involving moral turpitude, how can we conclude that the Special Inquiry Officer was in error in ordering Pino's deportation on the ground that such deportation was required by § 241(a)(4) of the Act? If the case went back for another administrative hearing, the same result would be inevitable. Other alleged procedural errors are strictly in the nature of grasping at straws, and we find no sufficient merit or plausibility in any of them to warrant special discussion.

The order of the District Court is affirmed.

APPENDIX B.

Pertinent Statutes.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Immigration and Nationality Act, Public Law 414, June 27, 1952.

SECTION 241(a), (b) AND (d), 66 STAT. 204-208, 8 U.S.C. SEC. 1251(a), (b) AND (d).

CHAPTER 5—DEPORTATION; ADJUSTMENT OF STATUS

GENERAL CLASSES OF DEPORTABLE ALIENS

SEC. 241 (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that

such disease, defect, or deficiency did not exist prior to his admission to the United States.

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (c) of this title, or under section 36 (c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or has been convicted under section 1546 of title 18 of the United States Code;

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

. . . . . .

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a), . . .

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was ad-

mitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there . . .

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing . . .

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a); or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon . . .

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted

of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: . . . has been convicted of any offense against section 13 of the Penal Code of the United States committed during the period of August 1, 1914, to April 6, 1917, . . .

(18) has been convicted under section 278 of this Act or under section 4 of the Immigration Act of February 5, 1917.

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

. . . . . .

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

SECTION 242(b), 66 STAT. 209, 8 U.S.C. SEC. 1252(b).

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

. . . . . .

SECTION 242(h), 66 STAT. 208, 8 U.S.C. SEC. 1252(h).

(h) An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

SECTION 405(a), 66 STAT. 280, 8 U.S.C SEC. 1101, NOTE.

SAVINGS CLAUSE

SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . .

Immigration Act of February 5, 1917.

SECTION 19(a), 39 STAT. 889, AS AMENDED BY 54 STAT. 671.

DEPORTATION OF UNDESIRABLE ALIENS GENERALLY

. . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one

year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; . . . shall, upon the warrant of the Attorney General, be taken into custody and deported: . . . *Provided further,* That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: Provided further, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States: . . .

SECTION 19(b), 54 STAT. 671.

(b) Any alien of any of the classes specified in this subsection, in addition to aliens who are deportable under other provisions of law shall, upon warrant of the Attorney General, be taken into custody and deported:

(1) . . .

(2) . . .

(3) Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of

any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.

(4) Any alien who, at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940.

(5) Any alien who, at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940.

No alien who is deportable under the provisions of paragraph (3), (4), or (5) of this subsection shall be deported until the termination of his imprisonment or the entry of an order releasing him on probation or parole.

[These functions were transferred to the ~~Secretary of Labor~~ Attorney General by Reorganization Plan V, 54 Stat. 1238.]

Act of May 26, 1922.

SECTION 2(e), 42 STAT. 596.

(e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens . . ."

Administrative Regulations Implementing the Immigration and Nationality Act (8 C.F.R.).

Sec. 242.53. . . .

. . . . . .

(b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of objections. . . .

(c) *Special inquiry officers; specific duties.* At the commencement of the hearing under this part, the special inquiry officer shall . . . (4) advise the respondent that he will have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government, . . .

Sec. 242.61. *Decision of special inquiry officer*—(a) *Preparation of written decisions.* . . . the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability, ... The decision shall be concluded with the order of the special inquiry officer as provided in paragraph (c) of this section.

(b) . . .

(c) *Order of special inquiry officer.* The order of the special inquiry officer shall be (1) that the alien be de-

ported, or (2) that the proceedings be terminated, or (3) that the alien's deportation be suspended, or . . .

(d) . . .

(e) *Finality of order.* The order of the special inquiry officer shall be final except when:

(1) . . .

(2) An appeal is taken to the Board of Immigration Appeals.

United States Code, Title 18, Crimes and Criminal Procedure.

§ 3651. SUSPENSION OF SENTENCE AND PROBATION.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

. . . . . .

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

. . . . . .

§ 3653. REPORT OF PROBATION OFFICER AND ARREST OF PROBATIONER.

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

. . . . . .

§ 3655. DUTIES OF PROBATION OFFICERS.

The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition.

. . . . . .

Rules of Criminal Procedure.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

. . . . . .

RULE 32. SENTENCE AND JUDGMENT.

. . . . . .

(b) JUDGMENT. A judgment or conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. . . .

Massachusetts General Laws (Tercentenary Edition).

CHAPTER 218.

SECTION 38. . . . Subject to any other provisions of law relative to the filing of complaints for particular crimes, district courts may place on file any complaint in a criminal case other than . . .

CHAPTER 265.

SECTION 23. Whoever unlawfully and carnally knows and abuses a female child under sixteen shall be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in any other penal institution in the commonwealth.

CHAPTER 266.

SECTION 30. (1) Whoever steals . . . the property of another . . . shall be guilty of larceny, and shall, if the value of the property stolen exceeds one hundred dollars be punished by imprisonment in the state prison for not more than five years or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen does not exceed one hundred dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars; . . . [As amended by St. 1945, c. 282, sec. 2.]

CHAPTER 276.

SECTION 87. The superior court may place upon probation under any of its probation officers any person before it charged with crime and any court may place any person convicted before it in the care of its probation officer for such time and upon such conditions as it deems proper; provided, that no person convicted of a felony by a district court shall be placed on probation by said court in such case if it shall appear that he has been previously convicted of any felony; . . .

CHAPTER 279.

SECTION 1. When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix. . . . [As amended by St. 1934, c. 205, sec. 1.]

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 333

ANTHONY PINO, PETITIONER

v.

HENRY NICOLLS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 23-40) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1954. The petition for a writ of certiorari was filed September 9, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

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QUESTIONS PRESENTED

1. Whether petitioner, an alien, was "convicted" of larceny in Massachusetts within the meaning of Section 241(a)(4) of the Immigration and Nationality Act of 1952 where, a year after he had been found guilty and given a suspended sentence of one year, the sentence was revoked and the case placed "on file."

2. Whether deportation of an alien under Section 241(a)(4) of the Immigration and Nationality Act of 1952 can be based on a conviction prior to the effective date of the act.

3. Whether petit larceny is a crime involving "moral turpitude" within the meaning of Section 241(a)(4) of the Immigration and Nationality Act of 1952.

4. Whether the introduction of petitioner's criminal record showing numerous arrests for other crimes invalidates the hearing at which petitioner was, on the basis of undisputed facts, found deportable.

STATUTES INVOLVED

The Immigration and Nationality Act of June 27, 1952, Section 241(a) (66 Stat. 204, 8 U.S.C. 1251(a)), provides in relevant part that:

> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after

entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

8 Code of Federal Regulations, Section 242.53 (b) provides as follows:

> (b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of objections. * * *

STATEMENT

On December 18, 1953, petitioner was taken into the custody of respondent, a District Director of the Immigration and Naturalization Service of the Department of Justice, pursuant to an order of deportation issued on a finding that he had twice been convicted of crimes involving moral turpitude (R. 3). Contending that this order was invalid, petitioner on the same date, December 18, 1953,

filed a petition for a writ of habeas corpus (R. 1, 2-12). The District Court issued the writ, held a hearing, and on February 1, 1954, entered an order discharging the writ and dismissing the petition (R. 104). This order was affirmed by the Court of Appeals on August 2, 1954.

The evidence against the petitioner, found by the Special Inquiry Officer (R. 64-74) and the Board of Immigration Appeals (R. 76-95) to be true, was substantially as follows:

Petitioner is an alien who was born in Italy in 1907. He was admitted to the United States in 1908 for permanent residence and has maintained his residence in the United States since that time.

In December 1948, in a District Court of the Commonwealth of Massachusetts, petitioner was charged with having stolen twelve golf balls. He entered a plea of not guilty, but was found guilty and sentenced to one year in the House of Correction. Appeal was taken on December 27, 1948, but on December 28 was withdrawn by leave of court and a motion for a new trial was filed and allowed. On January 4, 1949, he was again found guilty, and again sentenced to one year in the House of Correction. An appeal was filed on January 10, 1949, but on January 28 the appeal was withdrawn by leave of court and the sentence suspended, and petitioner was placed on probation. On January 30, 1950, appeal was waived, the sentence revoked, and the case placed "on file." (See Exhibit 5, R. 57-58, 18-19.)

It was also shown that earlier, in January, 1928,

petitioner had been indicted by a grand jury in Suffolk County, Massachusetts, for abuse of a female child. He entered a plea of not guilty, but he was found guilty as charged and sentenced to be committed in a Massachusetts Reformatory for a period of five years and one day (Exhibit 6, R. 59-60, 19).

The warrant of arrest in the immigration proceedings had charged a prior conviction for rape, but at the deportation hearing it developed that the conviction was for abuse of a female child. A new charge was lodged during the hearing to conform to the actual facts (R. 20), and the Inquiry Officer permitted the petitioner additional time to respond. Petitioner objected that this lodging of a new charge indicated that the inquiry officer was acting as an investigative rather than a judicial officer, which was improper under the regulations of the Immigration and Naturalization Service. In this connection, petitioner also charged at the hearing that the Inquiry Officer had before him papers which were not introduced at the proceeding; that he was improperly relying on those papers and thus in fact acting as an investigative officer with respect to petitioner's case (R. 21-23). The Inquiry Officer would not disclose the contents of the papers but indicated that his only consideration of the record in the case was to familiarize himself with the facts so that he could act as a judicial officer (R. 28).

In addition the Special Inquiry Officer placed in the record two reports, one by the Federal Bureau

of Investigation and one from the Massachusetts Board of Probation, which showed petitioner's long criminal record consisting mostly of arrests on charges for which he had not been convicted. These records were admitted over the petitioner's objection on the Inquiry Officer's view that they were merely "cumulative evidence" (R. 25-26).

ARGUMENT

1. Petitioner contends that he has not been convicted of two crimes involving moral turpitude within the meaning of Section 241(a)(4) of the Immigration and Nationality Act of 1952 because, on the larceny charge, there was no sentence imposed and the case was put "on file" without final disposition.

Petitioner was tried on a plea of not guilty and found guilty of larceny of a dozen golf balls in a District Court of the Commonwealth of Massachusetts. That court, after two unperfected appeals, and a second trial, sentenced him to one year's imprisonment, suspended the sentence, and placed him on probation for a year. At the end of the year, the court revoked the sentence and placed the case on file.

So far as we have been able to determine, authority to place a case on file stems from Section 38 of Chapter 218 of the Laws of Massachusetts, which provides for the sittings, adjournments and continuances of cases, and then states:

> * * * Subject to any other provisions of law relative to the filing of complaints for partic-

> ular crimes, district courts may place on file any complaint in a criminal case other than a complaint for the commission of a felony issued against a person who appears previously to have been convicted of a felony or previously to have had a complaint for felony placed on file.

This statute apparently authorizes what has long been a common practice in Massachusetts. It was explained in *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133, 136, as follows:

> It has long been a common practice in this Commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute. Sts. 1865, c. 223; 1869, c. 415, §60. Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which a case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets,

> and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein.

The issue is whether the disposition of petitioner's case by placing it on file prevents it from being a conviction within the meaning of Section 241(a)(4). The Court of Appeals, in a unanimous opinion by Chief Judge Magruder, held that it did not.

Petitioner's discussion of the interpretation of the word "conviction" by the Supreme Judicial Court of Massachusetts is largely irrelevant. "Conviction" is used sometimes to refer to the adjudication of guilt, as distinguished from the sentence, and sometimes more broadly to encompass the sentence. As the various Massachusetts cases cited show, the resolution of which of the two meanings of "conviction" is intended depends on the purpose and context of the statute involved. Here, as the Court of Appeals held, the meaning of the word "convicted" in the Immigration and Nationality Act is a federal question, and state decisions, even if they were more explicit than they are, would not be controlling.

The earlier immigration law had authorized deportation only of aliens who had been convicted *and* sentenced to imprisonment (8 U. S. C. (1946 ed.) 155). The change in the present act to provide for deportation where there has been conviction of two crimes, regardless of whether confinement

was imposed, reflects the policy of Congress to make deportable persons who are twice convicted, even though as to one or both crimes extenuating circumstances might cause a judge merely to put a defendant on probation.

In this context, the court below thought it clear that conviction, as used in the Act, refers to an adjudication of guilt. On such a construction of the Act, a distinction ought not to be drawn between a case where the sentence was suspended and the defendant put on probation, and a case, like the present, where, after one year's probation under a suspended sentence, the sentence was revoked and the case was put "on file." Indeed, it seems very clear that the "on file" status under Massachusetts law is akin to probation.[1] It is sometimes imposed because of conditions which throw some doubt on the state of the law. It may be imposed because of the court's judgment of the defendant's merits. In any event, the status of the case as on file may be ended by the court on appropriate notice to the defendant.

Weighing against petitioner is the fact that the case could not have been left on file without his consent. Petitioner could at any time have reactivated the case and taken an appeal to contest the validity of the adjudication of guilt (see *Dowdican*

[1] It is noteworthy that the Supreme Judicial Court of Massachusetts has at least intimated that placing a case on file may be the same as suspension of sentence (*King* v. *Commonwealth*, 246 Mass. 57) or probation (*Finer* v. *Commonwealth*, 250 Mass. 493, 497).

case quoted *supra*, p. 7). Thus there is of record an adjudication of guilt, which the placing of the case on file has clearly not wiped out, and which petitioner has not attempted to have wiped out. Although the matter is not altogether free from doubt, we believe the court below was warranted in holding that petitioner is within the deportable category of those "convicted" of two offenses involving moral turpitude. In any event, the question lacks sufficient importance to justify further review.

2. The answer to petitioner's contention that convictions, as a basis for deportation under Section 241(a)(4) of the Immigration and Nationality Act, must have occurred after the effective date of the Act, is that Section 241(d) explicitly provides that, except as otherwise provided in the section, the whole of Section 241 has application to events which preceded the Act. It states:

> Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act [June 27, 1952], or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to the date of enactment of this Act [June 27, 1952].

Petitioner argues at some length that the reference in subsection (a)(4) to an alien who "is" convicted must mean convicted after the effective date of the Act. He points out that other subsections refer to having done certain things "at any time after entry" or use the present participial form. Since convictions remain of record after punishment has been served, an alien with past convictions is an alien who "is convicted" within the literal language of Section 241(a)(4). Moreover, as noted, petitioner's contention is contrary to the clear language of subsection (d) that subsection (a) shall be applicable, notwithstanding that the alien entered the United States prior to June 27, 1952, and notwithstanding that the "facts" which bring an alien within any of the "classes" enumerated in subsection (a) "occurred prior to" June 27, 1952.

The "except as otherwise specifically provided in this section" clause of subsection (d) makes it clear that the only parts of subsection (a) that are to be considered exclusively prospective are those which are *specifically* applicable only to future acts or occurrences. Subsection (a)(3), providing for the deportation of an alien who "hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease," is an example of specific language limiting the application of a particular provision to future occurrences. This sharply contrasts with the "is convicted," upon which petitioner relies, appearing

in paragraph (4). This contrast emphasizes that the "is" in paragraph (4) is not language "specifically" removing that paragraph from the operation of subsection (d).

3. Petitioner next contends that the offense of theft of a dozen golf balls does not involve moral turpitude.[2] Congress has not specifically enumerated the offenses which involve moral turpitude. Nor has it in terms declared that the circumstances in which a crime was committed are irrelevant in determining its moral quality. As a *de novo* proposition it might appear appropriate, and consistent with the legislative policy embodied in the provision, to hold that petit larceny could in some circumstances be regarded as not necessarily involving moral turpitude. But in the relatively few cases where this question has been raised, the lower federal courts have uniformly stated that larceny, of whatever degree and in whatever circumstances, involves moral turpitude. *Tillinghast* v. *Edmead*, 31 F. 2d 81, 83-84 (C.A. 1); see also *Wilson* v. *Carr*, 41 F. 2d 704, 706 (C.A. 9); *United States ex rel. Ulrich* v. *Kellogg*, 30 F. 2d 984, 986 (C.A. D.C.); *United States ex rel. Patricola* v. *Karnuth*, 9 F. Supp. 961, 962-963 (W.D. N.Y.); *United States ex rel. Fracassi* v. *Karnuth*, 19 F. Supp. 581, 583-584 (W.D. N.Y.); *United States ex rel. Rizzio* v. *Kenney*, 50 F. 2d 418 (D. Conn.). Such a construction

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[2] The contention that "moral turpitude" as a standard is void for vagueness was rejected by this Court in *Jordan* v. *De George*, 341 U. S. 223, 229-232.

of the statute, though it doubtless could in some cases lead to harsh and oppressive results, cannot, therefore, be rejected by the Government as an erroneous interpretation of the legislative will. Moreover, we cite the comment of Chief Judge Magruder for the Court of Appeals on this point (Pet. 37-38):

> There is some force in the comment by Judge Anderson, dissenting, in *Tillinghast* v. *Edmead, supra* (at p. 84): "It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude." Indeed, it is possible to conceive of circumstances under which almost any crime might be committed from the purest of motives, motives, however, which the law does not accept as a defense. But here again, with considerations of administrative workability in mind, Congress has painted with a broad brush. If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma

> of moral obliquity. * * * Congress did not overlook the possibility of extenuating circumstances in the particular case [as appears from exceptions of section 241(b) of the Immigration and Nationality Act] * * *.

4. Petitioner's final contention is that the conduct of the administrative proceedings was in violation of regulations of the Immigration and Naturalization Service in that the Special Inquiry Officer did not act in a judicial capacity as he was required to do under 8 C.F.R. § 242.61. Specifically, he points to the fact that the Special Inquiry Officer, in answer to petitioner's objection at the hearing to the officer's question as to the number of times he had been arrested, stated (R. 17):

> A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act.

In addition, he relies on the fact that the Special Inquiry Officer permitted the introduction, as "cumulative evidence," of two reports of petitioner's past criminal record which contained "investigative leads."

Although neither the hearing officer nor the Board of Immigration Appeals relied upon the reports, petitioner urges that their admission, to-

gether with the Inquiry Officer's statement that he was not limited to the charge contained in the warrant of arrest, indicate that the officer did act in an investigative as well as judicial capacity, and rendered the hearing accorded petitioner unfair.

Petitioner's contentions are unsound. In a habeas corpus proceeding only those errors which affect the fundamental fairness of the procedings are relevant. *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 106; *Tisi* v. *Tod,* 264 U. S. 131, 133-134. Petitioner does not contend, and he cannot, that the errors of which he complains affected in any way the question of his deportability as a matter of law. The issues as to whether the crimes for which petitioner had been convicted involved moral turpitude and were in fact convictions arise on undisputed facts and depend upon application of legal principles which are subject to review by the courts. Hence, the admission of irrelevant evidence of petitioner's criminal record or the attempt to discover whether there were grounds for petitioner's deportation other than those charged in the warrant of arrest could not have affected the essential issues resolved at the hearing.

CONCLUSION

The order of deportation in this case complied with the requirements of law. No question warranting review by this Court is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

OCTOBER 1954.

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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 333.

ANTHONY PINO,
Petitioner,

v.

HENRY NICOLLS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The decision and order of the Special Inquiry Officer (R. p. A64) and the decision of the Board of Immigration Appeals (R. p. A75) are unreported. The opinion of the District Court (R. p. A104) is reported at 119 F. Supp. 122. The opinion of the Court of Appeals (R. p. 128) is reported at 215 F. (2d) 237.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 2, 1954 (R. p. 143). The petition for a writ of certiorari was filed September 9, 1954. The petition was granted November 8, 1954 (R. p. 144). The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

Constitutional Provisions, Statutes and Regulations.

1. Section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204, provides:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> . . . . . .
>
> "(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"
>
> . . . . . .

2. Also involved and set out in Appendix B are the Fifth and Eighth Amendments to the United States Constitution and a portion of section 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U.S.C. sec. 1252(b); section 405(a) of the Immigration and Nationality Act, 66 Stat. 280; portions of section 242.53(b) and section 242.61 of the Administrative Regulations Implementing the Immigration and Nationality Act, 8 C.F.R. 1952 revision.

3. Appendix B also includes other provisions and rules less directly involved to which reference is made.

Questions Presented.

I. Whether an alien was "convicted" within the purview of section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204, where he was granted probation and given a year's suspended sentence, after having been found guilty of stealing twelve golf balls by a local Massachusetts court of limited jurisdiction sitting without jury and where, after a satisfactory probation, the sentence was revoked and the case placed on file, *i.e.*, continued generally.

II. Whether the theft of a dozen golf balls is a "crime involving moral turpitude."

III. Whether section 241(a)(4) of the Immigration and Nationality Act should be given a retrospective construction, making it applicable where the "conviction" on which deportation is based occurred prior to the effective date of the Act.

IV. Whether the court below erred when it refused to declare the deportation order void though it was based on proceedings conducted in violation of procedural due process and of the requirements of the Immigration and Nationality Act and the Regulations issued thereunder, but instead went behind the order to determine the petitioner's deportability.

Statement of the Case.

In this case the petitioner challenges the validity of an order of deportation. The petitioner was brought to the United States about forty-six years ago when he was about

a year old. He has lived here continuously since that time and is married to an American citizen (R. pp. A64, A2).

In 1926, when the petitioner was twenty years old, he was convicted in Massachusetts of violating General Laws (Ter. Ed.) c. 265, sec. 23, prohibiting carnal knowledge of a girl under sixteen years of age. In December, 1948, the petitioner was charged with the theft of a dozen golf balls in the Third District Court of Eastern Middlesex. This is a local Massachusetts court of limited jurisdiction sitting without jury. From this court a defendant has a right of appeal to the Superior Court, where he is given a trial *de novo* before a jury (see Opinion of court below, R. pp. 132-134). The petitioner pleaded not guilty, but was found guilty on January 4, 1949. The court subsequently on January 28, 1949, granted him probation, suspending a one year's sentence in the House of Correction to January 30, 1950. On that date it appeared to the court that the probation had been satisfactory and the court therefore revoked the sentence and placed the case on file (R. pp. A58, A102-103; see Opinion of court below, R. pp. 132-134), *i.e.*, continued it generally (R. p. A78).

Based on these two charges, both of which occurred more than five years after the petitioner's entry into the United States, a Special Inquiry Officer of the Immigration and Naturalization Service on March 23, 1953, issued the order of deportation under section 241(a)(4) of the Immigration and Nationality Act.

This order was issued after proceedings begun on or about January 5, 1952, when a warrant was issued for the petitioner's arrest. Relevant parts of these proceedings are more fully described in the argument regarding their validity.

The deportation order of March 23, 1953, was affirmed by the Board of Immigration Appeals on August 11, 1953. The petitioner surrendered on December 18, 1953, pursuant

to notification to report for deportation, and on the same day filed a petition for habeas corpus in the United States District Court for the District of Massachusetts, pursuant to 28 U.S.C. sec. 2241(a). The District Court issued the writ, but after a hearing on the merits discharged the writ and dismissed the petition on February 1, 1954. The petitioner appealed to the Court of Appeals for the First Circuit, which, on August 2, 1954, affirmed the order of the District Court.

Summary of Argument.

I. The record in the golf ball case is not a record of conviction since it indicates that the petitioner was found guilty and given a suspended sentence and probation and that after a satisfactory probation the sentence was revoked and the case placed on file. Under Massachusetts law this is not a final disposition of the case since a defendant may, where his case is on file, require the court to impose sentence, from which sentence he would have a right to appeal and a jury trial *de novo* in the Superior Court. But, apart from finality, a "conviction" must import criminality appropriate for the imposition of collateral disabilities and penalties. This has been the assumption of the Board of Immigration Appeals and the courts in assessing the sufficiency of a state court record as a basis for deportation. They have looked to see if the law of the state in which the record was made imposes disabilities or collateral penalties on the basis of that record. Of course, Congress could have made its own definition of conviction, but, absent any indication that it did so, the state action it utilizes as a basis for deportation must be evaluated by state law.

In Massachusetts the record in the golf ball case cannot be the basis for the imposition of disabilities since it does

not contain a sentence actually served. The fact that the defendant has been on probation reinforces this conclusion since probation in Massachusetts looks to rehabilitation and does not stamp the defendant as a criminal. It requires the consent of a defendant and indeed in the Superior Court may be imposed even before a finding of guilt.

Moreover, even if some general definition of "conviction" is contemplated by Congress, it must be found (unless there is strong indication to the contrary) in the background of federal decisions against which Congress was legislating. But since 1833 the federal courts have held that a conviction must include a sentence where it is made the basis for imposition of collateral penalties. Moreover, probation under the federal law is not punishment; and an interpretation of the Immigration and Nationality Act in harmony with the purposes of the Probation Act thus requires that a record of the type here involved—where a court has decided that a defendant does not require punishment but merits an opportunity for rehabilitation—should not be treated as a basis for imposing the penalty of deportation.

The Immigration and Nationality Act itself contemplates a sentence (sec. 241(b), 8 U.S.C. sec. 1251(b)) and imprisonment (sec. 242(h), 8 U.S.C. sec. 1252(h)). The contrast between section 212(a)(9), 8 U.S.C. sec. 1182(a)(9), which excludes an alien who not only has been convicted of but admits having committed a crime involving moral turpitude, and section 241(a)(4), 8 U.S.C. sec. 1251(a)(4), which does not permit deportation on the basis of an admission, indicates that Congress intended in section 241(a)(4) a pronouncement by a court that an alien's criminal act deserves punishment.

The only indication in section 241(a)(4) that a "conviction" includes something less than a sentence is the phrase "regardless of whether confined therefor." But nowhere in the legislative history is there any mention that so drastic

a change from the requirement of one year's sentence was contemplated. On the contrary, the legislative history indicates that this phrase was inserted to obviate the decision in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, and to provide that deportation can follow two convictions regardless of whether the alien was confined for each offense separately. Thus that phrase makes sufficient for deportation concurrent sentences or a single sentence on two counts where the two counts do not arise out of a single scheme of criminal misconduct. Actual confinement still is necessary.

II. The theft of a dozen golf balls is not a "crime involving moral turpitude." In Massachusetts theft of property valued at not more than $100 is a misdemeanor punished by imprisonment in jail for not more than one year or by a fine of not more than $300—a penalty far less severe than the punishment for larceny over $100, which is a felony. Contrary to the expressions in Blackstone that larceny is *malum in se* and a felony, it seems clear that the English law, both common law and statutory, did not regard all theft in the same light. What and how much was stolen was always material to the type of trial and the type of punishment. Although the American courts (uncritically following Blackstone) regarded petty larceny as a felony in applying technical common law rules such as those regarding the disqualification of witnesses, 17th, 18th and 19th Century America regarded small theft as a petty offense, classing pilferers with "common pipers" and "peddlers and hawkers," trying them before justices of the peace without jury and with jurisdiction to mete out small fines or light jail sentences. The distinction between grand and petty larceny has persisted not only in Massachusetts statutes but in Congressional legislation.

The cases which have actually permitted deportation on the basis of petty larceny are very few. The Board of Immigration Appeals, though calling petty larceny a "minor

infraction," has held that it involves moral turpitude on the theory, apparently, that the intent is somehow the same in all larceny. But the intent is to do the act, and the act here is pilfering a dozen golf balls. From the statute and the record, which is all that the court can look at, this would seem to be a most venial crime.

Petty larceny does not fit into the category of felonies involving fraud which *Jordan* v. *De George*, 341 U.S. 223, marked out to save the phrase "moral turpitude" from being void for vagueness. But no other category consistent with Congressional intent but still sufficiently definite will include petty larceny. The Government in its brief in *Jordan* v. *De George* suggested that "crimes involving moral turpitude" means infamous crimes or serious penal offenses. These as well as the felony-misdemeanor distinction have a basis in legislative history, but none of these categories include petty larceny.

Decisive, it would seem, is the treatment of petty larceny in the 1948 revision of the Criminal Code, where larceny not in excess of $100 is included by the revisors among those crimes which they state do not involve moral turpitude.

To interpret petty larceny as sufficient for the imposition of the drastic penalty of deportation raises serious questions whether the Immigration and Nationality Act does not—in view of *Weems* v. *United States*, 217 U.S. 349—violate the prohibition in the Eighth Amendment against cruel and unusual punishment or the due process clause of the Fifth Amendment to the extent that it incorporates the principles of the Eighth Amendment.

III. "Is convicted" in section 241(a)(4) is a specific prospective designation making that subsection inapplicable to crimes and convictions that occurred before the effective date of the Act. Subsection 241(a)(4) is one of eighteen subsections in section 241(a). That section 241(a) contains a multitude of subtle tense distinctions, many of which are

obviously appropriate to effect retrospectivity. Moreover, *Kessler* v. *Strecker*, 307 U.S. 22, had alerted Congress to the consequences of using the present tense, and *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, had instructed Congress just how to accomplish retrospectivity. In the light of these cases and the marked contrast between other subsections and subsection 241(a)(4), this subsection specifically provides for prospective application so that section 241(d) is inapplicable. Section 241(d) was designed to cope with ambiguities in the complexities of section 241(a), but subsection 241(a)(4) is not ambiguous. The legislative history bears out that Congress did not intend retrospectivity except in subsection 241(a)(2) and in those provisions which merely continued existing law—a proposition which the Government rejects as to section 241(a)(4).

A prospective interpretation of section 241(a)(4) is moreover in harmony with section 405(a), according to which the petitioner might be liable to deportation under section 19(a) of the Immigration Act of 1917 if he is sentenced in the future to imprisonment for a year or more for a crime involving moral turpitude.

IV. The deportation order was based on proceedings in which the Special Inquiry Officer acted as an investigating official contrary to section 242(b) of the Act and section 242.53(b) of the Regulations (8 C.F.R.), which provides that the Special Inquiry Officer "shall conduct a fair and impartial hearing." He introduced irrelevant evidence, termed by the United States District Court of a "highly incendiary character" (R. p. A113), contrary to section 242.53(b), which also provides that the Special Inquiry Officer "shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious." Thus the petitioner was deprived of a fair and unbiased appraisal of the questions of law involved. Moreover, apart from the minimum procedural due process provided by the Fifth

Amendment, the deportation order, based as it is on violations of the Act and Regulations, is invalid, and the detention of the petitioner under that order is illegal. The legislative history of the Act indicates that Congress contemplated that the courts would not go behind a deportation order to see if the defendant was actually deportable, but would enforce the procedural requirements of the Act and Regulations.

Argument.

I. The petitioner was not "convicted" of the theft of twelve golf balls within the meaning of section 241(a)(4) of the Immigration and Nationality Act.

Whether there has been a conviction depends on the effect of the proceedings in the Third District Court of Eastern Middlesex as embodied in the record of that court (R. pp. 57-58). But that paper has meaning only with reference to the law of Massachusetts. It is to Massachusetts law, therefore, that we must look to see—

First, whether the record imports finality. The court below rejected the Government's contention and the contention of the Board of Immigration Appeals that finality was not necessary and that a mere finding of guilt makes an alien deportable even while the finding is being appealed. The court below correctly looked to Massachusetts law to assess the finality of the finding of guilty, although we contend its conclusion was erroneous.

Second, whether the record imports criminality appropriate for the imposition of collateral penalties and disabilities. Here too the Board of Immigration Appeals and the courts, in deciding whether there was a record of conviction in a given case, have looked to state law to see whether the state imposed disabilities on the basis of that record.

Thus the Board of Immigration Appeals has held that a finding of guilt in California when it was followed by probation and even a jail sentence was not a conviction within the meaning of section 3 of the Immigration Act of February 5, 1917 (as applied in section 19(a) of that Act, providing for the deportation of aliens "convicted" prior to entry), because most disabilities under California law were wiped out after a satisfactory probation. *In the Matter of O— T—*, 4 I. & N. Dec. 265. Cf. *In the Matter of F—*, 1 I. & N. Dec. 343. In *Wilson* v. *Carr*, 41 F. (2d) 704 (C.C.A. 9th), the court looked to the same California law and held that an alien was not deportable while on probation although he had been found guilty and served part of a year's term ancillary to the probation. There too, after a satisfactory probation, the alien would be relieved from penalties and disabilities. In *United States ex rel. Cerami* v. *Uhl*, 78 F. (2d) 698 (C.C.A. 2d), the court analyzed the New York law in determining that an order of confinement to the New York House of Refuge was not a "sentence" within the Immigration Act of February 5, 1917. Cf. *Perkins* v. *United States ex rel. Malesevic*, 99 F. (2d) 255 (C.C.A. 3d).

The Board of Immigration Appeals in this very case (R. p. A77), following *United States ex rel. Freislinger on Behalf of Kappel* v. *Smith*, 41 F. (2d) 707 (C.C.A. 7th), looked to the law of Massachusetts for the meaning of the word "conviction." Reference to state law also follows from *United States* v. *Di Re*, 332 U.S. 581, in which this court held that the validity of an arrest in New York was determined by the law of New York.

A. The record in the golf ball case does not import finality.

The record in this case indicates that after a finding that the defendant was guilty of the theft of a dozen golf balls

the District Court suspended a one year's sentence in the House of Correction, placing the petitioner on probation under Massachusetts General Laws (Ter. Ed.) c. 279, sec. 1. In accepting the probation the defendant's right of appeal to the Superior Court from that sentence was waived since "The appeal must be taken forthwith or is assumed to have been waived." *Sylvester* v. *Commonwealth*, 253 Mass. 244. This was a "temporary, not a final disposition of the case," *King* v. *Commonwealth*, 246 Mass. 57, at 60; the sentence could be modified at any time during the term of the probation. But while the defendant was within the probation system he could not appeal. This followed from the nature and purpose of the probation system as explained in *Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90, at 92-93. The court said of the probation system:

> "This plan would be frustrated if there remained the right at any time to upset the working of these influences by breaking the terms of the probation and appealing to the Superior Court. All the time and effort expended in his behalf would be wasted. The elaborate and expensive probation system in connection with the suspended sentence for district courts hardly would have been established provided there still remained the right in the person convicted, if discontented with the measures taken for his benefit and reformation, to remove his case from the jurisdiction of the district court to that of the Superior Court."

At the end of the petitioner's probation it appeared that the probation had been satisfactory and the court therefore revoked the sentence. It did not, however, dismiss the case, but placed it on file, thus continuing it generally outside the probation system by virtue of its common law

powers. The effect of placing a case on file is described in *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133, at 136:

> "It has long been a common practice in this Commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute. Sts. 1865, *c.* 223; 1869, *c.* 415, § 60. Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein."

The Board of Immigration Appeals adds (R. p. A78):

> "There has been merely a suspension of active proceedings in the case, and as yet no final disposition (*Commonwealth v. Carver*, 224 Mass. 42)."

Thus we have here a continuance, and, like any other continuance, it does not bar further proceedings in the case; at any time, on motion of the defendant (the petitioner here) or on motion of the prosecutor or the court, further proceedings may be had from which the defendant

may (if sentenced) appeal to the Superior Court, thus vacating the finding and sentence.

This is also set out in the letter of June 4, 1953, by the Assistant Clerk* of the Third District Court of Eastern Middlesex (R. p. A74; see also A81), supplementing his letter of January 9, 1953 (R. p. A35), and made a part of the record in these proceedings. He writes:

> "It appears that since the original sentence is revoked, if a new sentence be imposed the defendant would thereupon have the right to appeal to the Superior Court from the new sentence if so imposed. If the original plea entered by the defendant in a case was 'not guilty' upon an appeal the matter is thereupon certified to the Superior Court for trial de novo."

That a defendant has a right to have sentence pronounced and a right of appeal in this situation was decided in *Marks* v. *Wentworth,* 199 Mass. 44, where, as in this case, the defendant had been placed on probation with his consent. Later the case was placed on file. The court refused to sentence the defendant and he brought mandamus to compel the court to sentence him, so he could appeal. The court issued the mandamus. There was apparently some question as to whether the order placing the case on file was valid, since it was entered without the defendant's consent. The court said this was immaterial, since, "if the order be given any effect, it leaves the case still in court, subject to be disposed of hereafter."

The Fifth Report of the Judicial Council of Massachusetts, Public Document No. 144 (reprinted in 15 Mass. Law Quarterly (2), December, 1929), p. 29 *et seq.,* contains a detailed discussion of the procedure here involved and

*A subpoena for the Assistant Clerk had been refused by the Special Inquiry Officer (R. p. A30).

concludes that it is not a "final conviction." (See Appendix A.)

The Board of Immigration Appeals has substantially accepted this analysis and bases the order of deportation on the finding of guilt itself regardless of its finality.* The United States District Court followed the Board of Immigration Appeals in holding that a mere finding of guilt is a sufficient conviction, though it questioned the power of the Third District Court of Eastern Middlesex to place the case on file. The court based its doubt on *Commonwealth* v. *Maloney,* 145 Mass. 205, cited to it by the respondent. But that case merely held that a trial justice (similar to a justice of the peace) had no power to place a case on file.† It expressly confirms this power in the District Courts and its explanation of the practice at pages 210-211 of the opinion has been cited in subsequent cases, *e.g., Marks* v. *Wentworth,* 199 Mass. 44.

The Court of Appeals, as set out above, rejected the respondent's contention that a mere finding of guilt was sufficient to make an alien deportable even while an appeal was pending. It held, however, that the record here indicated sufficient finality because the petitioner had, through delay, lost his right to have a sentence imposed from which he could appeal. This delay, the court states, would bar the writ of mandamus issued in *Marks* v. *Wentworth.* But

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*In its opinion (R. p. A81) it expresses some doubt as to whether an appeal will lie if the defendant (petitioner here) is sentenced, citing *Renado* v. *Lummus,* 205 Mass. 155. But that case turned on the right of appeal from a sentence which had been imposed and suspended under the probation system. Appeal from such a sentence a week later came too late. The record in our case indicates that there is no outstanding suspended sentence and that the defendant has been removed from the probation system. There is merely a continuance (*Marks* v. *Wentworth, supra.*)

†Since changed by statute, Massachusetts General Laws, c. 219, sec. 8 (1917).

delay, standing alone, is not sufficient to sustain a defense of laches. *Peckham* v. *Mayor of Fall River*, 253 Mass. 590. *Shea* v. *Shea*, 296 Mass. 143, at 149.

The respondent, in its brief in opposition (pp. 9-10), recognizes the right of the petitioner to have sentence imposed, but argues that it is incumbent upon him to make the request. It is submitted that the petitioner need not take the risk of a trial in the Superior Court when its result may mean possible deportation.

B. The record in this case, since it does not include a sentence actually imposed, does not import criminality effective to impose collateral disabilities or penalties on a defendant.

This is well settled in Massachusetts. *Commonwealth* v. *Kiley*, 150 Mass. 325. *Commonwealth* v. *Hersey*, 324 Mass. 196, at 205. *Attorney General* v. *Pelletier*, 240 Mass. 264, at 310-311. *People* v. *Schaller*, 229 N.Y.S. 492. Fifth Report of the Judicial Council of Massachusetts, Public Document No. 144 (reprinted in 15 Mass. Law Quarterly (2), December, 1929), p. 29 *et seq.* (Appendix A.) See also *Renado* v. *Lummus*, 205 Mass. 155; *Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90, at 92.

In *Commonwealth* v. *Kiley* the defendant was prosecuted for selling liquor without a license. He had been previously found guilty of violating the conditions of his license. He had appealed, his exceptions had been overruled and a rescript had been handed down but no sentence had as yet been imposed. The statute under which he had been previously found guilty provided that the license became void on "conviction," and the Commonwealth argued (as the Government did here) that the finding of guilt without more was such a conviction as to void the license. The

court held that the finding of guilt was not a conviction under that statute because "the effect of a conviction of the kind named is to deprive the defendant of a valuable right."

Commonwealth v. *Hersey* involves the use of a record of conviction to impeach the credibility of a witness under General Laws, c. 233, sec. 21. The court said:

> "It is settled that under this section, permitting the introduction of a record of conviction of a crime, the term 'conviction' means a final judgment and sentence of the court conclusively establishing his guilt. Merely showing a verdict of guilty or placing a defendant on probation does not satisfy the statute. . . . [Citing, among other cases, *Commonwealth* v. *Kiley*, also cited in *Attorney General* v. *Pelletier*.]"

Even the specific statutory change in clause 2 of chapter 233, sec. 21, making records of felonies admissible to impeach credibility where sentence has not been imposed, was held not to change the requirement of final sentence and judgment with reference to misdemeanors in clause 1, where the word "conviction" still remains unqualified. *Forcier* v. *Hopkins*, 329 Mass. 668.

In *People* v. *Schaller* the Appellate Division in New York held that, where a defendant had pleaded guilty in Massachusetts and his case had been placed on file, there was no conviction within the meaning of a New York statute providing life imprisonment for a person who had been convicted four times.

The United States District Court, the Board of Immigration Appeals and the Special Inquiry Officer rely on *Commonwealth* v. *Lockwood*, 109 Mass. 323, and *Munkley* v. *Hoyt*, 179 Mass. 108. The *Lockwood* case involved only the question whether the Governor could issue a valid pardon to a

defendant found guilty while his appeal was pending. The court itself distinguished the situation where collateral disabilities were involved, saying, at page 329:

> "When indeed the word 'conviction' is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; . . . And it might be held to have the same meaning in the somewhat analogous case in which the Constitution provides that 'no person shall ever be admitted to hold a seat in the legislature or any office of trust or importance under the government of this Commonwealth, who shall in the due course of law have been convicted of bribery or corruption in obtaining an election or appointment.' Const. Mass. *c.* 6, art. 2. See *Case of Falmouth,* Mass. Election Cases (ed. 1853) 203."

This distinction between *Commonwealth* v. *Lockwood* and *Commonwealth* v. *Kiley* is also made in *People* v. *Fabian,* 192 N.Y. 443, at 450.

Munkley v. *Hoyt,* on which the United States District Court, the Board and the Special Inquiry Officer place primary reliance, involved a statute authorizing the Board of Pharmacy to suspend or revoke the registration of a pharmacist pursuant to a statute providing that "the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after conviction by a court of competent jurisdiction." The licensee had been found guilty of unlawfully selling liquor and his case placed on file. On certiorari attacking the Board's revocation of the license, the court held that "conviction" in that statute did not re-

quire a final judgment, precisely because no disabilities flowed from it. The "conviction" was not the basis for the revocation of the license but merely a condition precedent to the initiation of an investigation by the Board (R. p. A30). The Board was bound to make its determination totally independent of the court record.

Munkley v. *Hoyt* itself recognizes at page 110 that, where a record is conclusive in proceedings "to deprive the defendant of a valuable right," *Commonwealth* v. *Kiley* applies, and the record must contain a final judgment.

C. The fact that the petitioner was placed on probation and the probation was satisfactory is itself inconsistent with the imposition of disabilities.

Probation in Massachusetts, where the concept originated, is contrary to the notion of punishment. As set out in 2 Attorney General's Survey of Release Procedures, p. 1:

> "Probation is the postponement of final judgment or sentence in a criminal case, giving the offender an opportunity to improve his conduct and to readjust himself to the community, often on conditions imposed by the court and under the guidance and supervision of an officer of the court. According to the Massachusetts court, 'probation looks to reformation and not to a final goal of punishment.' [Citing *Marks* v. *Wentworth.*]"

See also Chute, The Development of Probation in the United States (Glueck, Probation and Criminal Justice, pp. 228-229), *Mariano* v. *Judge of District Court of Central Berkshire, supra,* and Massachusetts General Laws, c. 276,

sec. 87, which permits the Superior Court to place a defendant on probation even before a finding of guilt.

In the Sixth Annual Report of the Massachusetts Commission on Probation, 1914 (p. 17), Public Document No. 85, cited in Grinnell, Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System, 2 Mass. Law Quarterly (6), 591 at 594, it is stated:

> "The probation service deals with human material that has not been stamped as criminal. It undertakes to build out of this a respect for law and correct personal conduct before the difficulty of that task has been heightened by penal experience."

We thus have here a record indicating that the court has refused to stamp the petitioner as criminal, but rather revoked the sentence on the basis of a satisfactory probation. It is submitted that this is not the type of court action which entails the imposition of so serious a penalty as deportation.

D. Reference to a general federal law as to the meaning of "conviction" yields the same result as an examination of Massachusetts law.

The federal courts have also required a sentence actually imposed where the "conviction" is used collaterally to impose a further penalty on a defendant. Thus in cases providing a greater penalty for a second or subsequent offense the federal courts have held that the first "conviction" must include a sentence. *United States* v. *Thompson*, Fed. Cas. No. 16,485, 4 Cranch C.C. 335 (1833). *Schooley* v. *United States*, 4 F. (2d) 767 (C.C.A. 8th). *Singer* v. *United States*, 278 F. 415 (C.C.A. 3d). *United States* v.

Stoddart, 11 F. (2d) 827 (D.C. E.D. Pa.). (*Cf.* Rule 32(b) of the Rules of Criminal Procedure.)

Even in a naturalization proceeding where the issue is merely the petitioner's good moral character, the court has held that, where the Government chooses to rely on a record of conviction to show bad moral character, the record must contain a final judgment. *In re Ringnalda*, 48 F. Supp. 975 (D.C. S.D. Calif.). Cf. *Wilson* v. *Carr*, 41 F. (2d) 704 (C.C.A. 9th).

The court below attributes to a probation order and a general continuance the serious consequence of a sentence. But neither a general continuance (*Miller* v. *Aderhold*, 288 U.S. 206, 208) nor probation is the final judgment which includes a sentence (*Berman* v. *United States*, 302 U.S. 211). Probation does not connote a sentence and the punishment inherent in a sentence. "Probation is concerned with rehabilitation," *Berman* v. *United States, supra, Korematsu* v. *United States*, 319 U.S. 432, at 435, *Roberts* v. *United States*, 320 U.S. 264, 272, and the dissenting opinion which (reaching the constitutional question that the majority did not have to consider) held that the imposition of a sentence after a period of probation did not "offend the safeguard of the Fifth Amendment against double punishment" (p. 276).

In *United States ex rel. Cerami* v. *Uhl*, 78 F. (2d) 698 (C.C.A. 2d), *supra*, the court went even further and held that confinement in the House of Refuge was not a "sentence." The Immigration Service itself in previous proceedings against this petitioner said (R. p. A63) that in this very case there was not a sentence within prior immigration laws, citing *United States ex rel. Robinson* v. *Day*, 51 F. (2d) 1022 (C.C.A. 2d).

Indeed, it seems inconsistent with the purposes of the Probation Act to make an alien deportable on the basis of proceedings in which a court has decided that he merits the opportunity for rehabilitation and does not require

punishment.* Nor is *Korematsu* v. *United States* to the contrary. It merely holds that a probation order is a final decision for appeal purposes. Cf. *Stack* v. *Boyle*, concurring opinion, 342 U.S. 1, at 12.

Authority generally on the consequences of probation in the imposition of collateral disabilities is scarce. The Attorney General's Survey of Release Procedures (vol. 2, p. 345) indicates that sentence is necessary for the imposition of collateral disabilities. The cases collected in 36 A.L.R. (2d) 1238, hold that a suspended sentence and probation do not result in disenfranchisement in those states where that is a consequence of conviction. *Cf.* cases collected in *Smith* v. *Commonwealth*, 134 Va. 589 (annotated in 24 A.L.R. 1290), holding that one cannot be removed from public office after verdict of guilty but before judgment.

Historically, moreover, disabilities flowed from the attaint—the final sentence—rather than the verdict, which Blackstone, in describing the various steps in a proceeding, terms the "conviction." 4 Blackstone, 362. But this distinction had apparently been blurred even in Blackstone's time (4 Blackstone, 381), and various statutes imposing disabilities use the word "conviction" alone. The word has therefore been interpreted to include the judgment or sentence from which the disabilities flowed historically. See also the common-law authorities cited in *United States* v. *Thompson*.

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*Probation in Massachusetts as set out above resembles a sentence even less than under federal law. It requires consent of the defendant (*Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90) and can be granted by a Superior Court even before a finding of guilt. G.L. (Ter. Ed.) c. 276, sec. 87. Cf. *King* v. *Commonwealth*, 246 Mass. 57, at 60, in which the court said: "The time during which the defendant was on probation was in no sense a part of the term of his sentence."

E. The Immigration and Nationality Act itself indicates that a sentence is required for a conviction.

The word "convicted" in section 241(a)(4) must be construed in the light of section 241(b) (8 U.S.C. sec. 1251(b)), which provides:

> "The provisions of subsections (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court *sentencing* such alien for such crime shall make, at the time of first *imposing judgment or passing sentence,* or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, . . ." (Emphasis supplied.)

It is obviously contemplated that the "alien convicted of a crime" must be sentenced "for such crime."

This is exactly the interpretative technique used in *United States ex rel. Cassetta* v. *Commissioner of Immigration,* 56 F. (2d) 826 (C.C.A. 2d). In that case the court interpreted the word "convicted" in the Narcotic Drugs Import and Export Act, May 26, 1922, c. 202, 42 Stat. 596, to include actual imprisonment because the section provided for the deportation of an alien upon "termination of the imprisonment imposed by the court upon such conviction." The court in that case held that a five-year suspended sentence was not a conviction sufficient for deportation.

Thus, too, Congress in passing section 20(b)(3), (4) and (5) of the Alien Registration Act of 1940, 54 Stat. 671-673 (incorporated in section 19(b) of the Immigration Act of 1917), making deportable aliens who "shall have been convicted" of various crimes, intended that that phrase should include actual imprisonment since it went on to provide that no alien deportable under those provisions "shall be deported until the termination of his imprisonment or the

entry of an order releasing him on probation or parole."* This clause is now incorporated in section 242(h) of the Immigration and Nationality Act.

Moreover, that Congress intended something more than a mere determination of guilt as a basis for deportation is apparent from a comparison between section 212(a)(9) and section 241(a)(4). Section 212(a)(9) excludes aliens on the basis of an admission of guilt. But for deportation Congress required a "conviction"—a solemn pronouncement by a court that the alien had committed a criminal act requiring punishment.

F. Legislative History.

Prior to this Act it was accepted that a sentence actually served was required for deportation. A suspended sentence was not sufficient. *United States ex rel. Robinson* v. *Day*, 51 F. (2d) 1022 (C.C.A. 2d) (R. p. A63). Nowhere, so far as we could find, is there the slightest intimation in the legislative history that the changes made in section 241(a)(4) were intended for the first time to subject an alien to deportation on the basis of a suspended sentence or a mere finding of guilt with or without probation. Certainly so drastic a change would have been mentioned.

Nor is the phrase "regardless of whether confined therefor" intended to accomplish this result. The most obvious answer is that this phrase was intended to make a sentence carrying a fine a basis for deportation. But the legislative history indicates that the phrase was used to solve an entirely different problem. In Senate Report No. 1515,

*The reference to release on probation as well as parole, is required to cover such states as Ohio, where "probation" may be granted even after sentence has begun (1 United States Attorney Release Procedures, p. 888), and Louisiana, where probation and parole are confused in the statutes (1 United States Attorney Release Procedures, p. 439).

81st Congress, 2d Session, at p. 391, it appears that the Committee on the Judiciary was concerned with modifying the former requirement that the alien be "sentenced more than once," which was interpreted in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, to mean sentences on two different occations. See Note, "Developments in the Law—Immigration and Nationality," 66 Harvard Law Review, 643, at 685.

Accordingly, it provided for two convictions "regardless of whether confined therefor"—that is, regardless of whether confined for each offense separately. Thus concurrent sentences or a single sentence on two counts where the two counts do not arise out of a single scheme of criminal misconduct (*cf.* Rule 8(a), Rules of Criminal Procedure) are now sufficient for deportation.

House Report No. 1365, 82d Congress, 2d Session, U.S. Code Congressional and Administrative News, 1952, p. 1653, at 1715, indicates that the phrase "regardless of whether confined therefor," instead of "sentenced more than once," was used to accomplish just this. It lists as deportable:

> "Aliens who, within five years of entry, are convicted of a crime involving moral turpitude and sentenced to confinement for a year or more; or who, at any time after entry, are convicted of two such crimes, whether or not confined. Thus, an alien who at any time after entry is convicted of two crimes involving moral turpitude is deportable, *regardless of whether confined therefor,* whereas under existing law the alien must have been sentenced *more than once* to a term of a year or more because of such convictions." (Emphasis ours.)

Thus, too, in the first part of section 241(a)(4), where Congress inserted after "sentenced" the words "or con-

fined," Congress did not intend to change the meaning of "sentenced" as there used (*United States ex rel. Robinson* v. *Day, supra*). It appears that this insertion was made to make clear that indeterminate sentences were sufficient for deportation. Here too it seems clear that actual confinement is contemplated. Thus Senate Report No. 1515, p. 391, states:

> "deportation should be required in the case of a single conviction only if the conviction occurred within five years after entry and resulted in confinement in a prison or corrective institution for a year or more."

On the basis of this analysis a sentence to confinement is necessary in both parts of section 241(a)(4), and this is asserted by Mr. Walter Besterman,* legislative assistant of the House Committee on the Judiciary, in a commentary on the Act printed with Title 8 of the United States Code Annotated (p. 61). He states:

> "Further, falling into the class of deportable aliens are the socially undesirables, . . . aliens convicted of crimes involving moral turpitude and sentenced to confinement . . ."

It may also be significant that Senate Report No. 1515, at page 71, states that the old immigration law imposes deportation for "conviction of a crime." The Judiciary Committee is obviously here using the word "conviction" to include a sentence actually served.

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*See comment by Congressman Graham, 98 Congressional Record, p. 4307: "First I want to add my word of appreciation for the work of our administrative assistant, Mr. Walter Besterman and his legislative clerk Mrs. Ruth Benn. I know of no two persons who have labored more than they have on the infinite details of this tremendous bill."

The interpretation by the court below, particularly when coupled with a retrospective interpretation of the section, will, we daresay, resurrect numberless cases long forgotten in which aliens had been granted probation and then probation had been terminated, as in the federal courts, or in which the proceedings after a satisfactory probation were continued indefinitely, as in our case. As in our case, probation was accepted, and no appeals were taken because the stakes were not high, and because in many states an appeal does not lie from a probation order. (Even in the federal courts there was great doubt on this question before *Korematsu* v. *United States.*) As in our case no attempts were made to get recommendations against deportation as provided by section 19(a) of the Act of 1917, predecessor to section 241(d) of this Act, since the proceedings could not be made grounds for deportation.

The interpretation sought by the Government is unnecessarily harsh, and it is submitted that this court should avoid such a result in deciding this question, which the Board of Immigration Appeals has characterized as "not free from difficulty" (R. p. A78). *Barber* v. *Gonzales,* 347 U.S. 637. *Fong Haw Tan* v. *Phelan,* 336 U.S. 6.

II.

THE THEFT OF A DOZEN GOLF BALLS IS NOT A "CRIME INVOLVING MORAL TURPITUDE."

Theft of property valued at no more than $100 is a misdemeanor in Massachusetts, punishable by imprisonment in jail for not more than one year or by a fine of not more than $300. Theft of property valued at more than $100 is a felony punishable by imprisonment in the state prison for not more than five years or by a fine of not more than $600 and imprisonment in jail for not more than two years. Massachusetts General Laws, c. 266, sec. 30; c. 274, sec. 1.

Difference in treatment between petty larceny and grand larceny goes back to the very beginnings of the common law. 2 Pollock & Maitland, History of English Law (2d ed.) pp. 495-498. The distinction occurs as early as 1275, in the Statute of Westminster I, c. 15. The differences which developed in the English law by the end of the 18th Century have led Professor Jerome Hall to conclude that petty larceny was not (contrary to the uncritical assumptions made in the American cases) even a felony. Hall, Theft, Law and Society (1st ed.) p. 298 *et seq. Cf.* 3 Holdsworth, History of English Law (3d ed.) pp. 366-367. That all stealing was not regarded alike in England is also indicated in such Special Acts as 10 George III, c. 18 (1770), which provided a penalty of 20 to 30 pounds for stealing dogs, or, in default, six to twelve months in the common jail, the trial to be before any two justices of the peace. See also 18 George II, c. 27 (1745).

In Massachusetts the difference between petty larceny and grand larceny is marked from the earliest colonial days. The General Laws of the Massachusetts Colony Revised and Published in 1660 (Burglary and Theft), p. 7, sec. 3 (Colonial Laws of Massachusetts, Boston, 1889, p. 127), contains an Act, apparently passed in 1652, which provides:

> "That what person shall steal from any person any coin, goods or chattels to the value of 10 shillings or upwards shall be whipped or pay such a sum or sums of money as the court or magistrate that hath proper cognizance thereof shall adjudge to be sufficient to satisfy all costs and charges of the court and country . . . to the use of the common treasury, and for smaller thefts it is left to the discretion of the judge or judges that shall have cognizance of the crime to appoint smaller mulcts or punishments or only legal admonition as they shall find cause."

A further clue to the colonial attitude towards small theft is found on page 67 of the 1660 Revision (Colonial Laws, Boston, 1889, p. 187), where "pilferers" are classed with "idle persons or stubborn persons" and "run-aways [and] common drunkards" among those who could be summarily committed by a magistrate to a House of Correction. Such institutions were "in purpose correctional institutions in a true sense of those words." *United States* v. *Moreland*, 258 U.S. 433, at 447. This statute was broadened in 1699, c. 8, sec. 2, Province Laws, 1690-1700 (I Acts and Resolves of the Province of Massachusetts Bay, 1692-1714, Boston, 1869, p. 378), to include along with "pilferers" a number of other petty types, such as "common pipers, fiddlers," etc.*

The Province Laws of Massachusetts (1692-1693) c. 18, sec. 3 (I Acts and Resolves of the Province of Massachusetts Bay, 1692-1714, p. 52), provided that theft be punished by forfeiture of three times the amount stolen and by fine not exceeding 5 pounds and whipping not exceeding 20 stripes. Justices of the peace were given jurisdiction where the "damage" did not exceed 40 shillings; and this in practical effect marked the distinction between grand and petty larceny. Chief Justice Shaw in *Jones* v. *Robbins*, 8 Gray, 329, at 347, in discussing the definition of infamous crimes, states:

> ". . . petty larceny or pilfering, associated as it is with vagrancy and other small and not well defined offences, has always been punishable by a magistrate or justice of the peace, both under the colonial and pro-

*This statute subsequently became chapter 272, sec. 53, of the General Laws of Massachusetts (1932 ed.), and continued to include "pilferers" until that category was eliminated by the Acts of 1943, c. 377. By that time the statute had "come to have a flavor of obsolescence." *Commonwealth* v. *Lombard*, 321 Mass. 294, 295.

vincial governments, from the earliest settlement of the country. Indeed, offences not above the degree of petit larceny are put, by Chancellor Kent, by way of example, as offences not infamous, and therefore not within the constitutional restriction."

In 1784, after the adoption of the Massachusetts Constitution, the jurisdiction of the justice of the peace was marked out more clearly to extend to cases of larceny where treble the value of the property stolen did not exceed 40 shillings. He was given authority to impose a fine not exceeding 40 shillings or imprisonment for not more than twenty days. Statute of 1784, c. 66, sec. 4. *Commonwealth* v. *Harris*, 8 Gray, 470, at 475.

In 1804 (Acts of 1804, c. 143, sec. 1) larceny of property not in excess of $100 was punishable by solitary imprisonment for a term not exceeding six months and by confinement afterwards to hard labor for a term not over one year, or by a fine not over $100 and imprisonment in the common jail for a term not exceeding one year. Larceny of property valued in excess of $100 was punished more severely. A further significant differentiation provided in section 2 of the same Act was in the jurisdiction of the courts. The Supreme Judicial Court was given jurisdiction over larceny exceeding $100. The Court of Common Pleas and the Boston Municipal Court (both sitting with jury) were given jurisdiction, concurrent with the Supreme Judicial Court, of larceny of property not in excess of $100. These intermediate courts were, however, not authorized to impose solitary imprisonment or hard labor. They could only impose a fine of not over $100 or imprisonment in the common jail of not over one year. Justices of the peace were given jurisdiction, concurrent with the other courts, of thefts not exceeding $5. A justice of the peace could impose a fine up

to a maximum of $5 and a maximum of twenty days in jail. Taking into account the far greater value of the dollar in 1804 it would seem that petty theft was generally handled by the justice of the peace. Chief Justice Shaw in *Jones* v. *Robbins*, 8 Gray 329, at 334, made this point in discussing the Revised Statutes of 1836, c. 126, sec. 18,* which gave the justice of the peace and the police court of Boston, also a summary court sitting without jury, jurisdiction where the value of the property stolen exceeded $15. They could impose a fine of not more than $15 or more than six months in the county jail. Chief Justice Shaw stated:

> ". . . jurisdiction was intended, according to a long course of practice, to be given to a justice of the peace or police court, in cases of petty offences and small pilfering, though amounting in law to larceny, and, of course, felony at common law—in case of simple larceny to the amount of $15, and in an aggravated larceny not exceeding $5; and that these should be deemed petty, and be punishable by a justice of the peace; . . ."

In that case he held unconstitutional a statute passed two years previously (Acts of 1855, c. 448, sec. 1), which he construed to permit police courts proceeding on complaint rather than indictment to impose a sentence in the state prison for larceny. He held that imprisonment in the state prison was an infamous punishment and could be punished only upon indictment. A new statute was immediately

*By section 17, chapter 126 of the Revised Statutes of 1836, larceny of property valued not in excess of $100 had been made punishable by no more than one year's imprisonment in the state prison or county jail or a fine of not more than $300. Larceny of property valued in excess of $100 had been made punishable by no more than five years' imprisonment in the state prison or by fine not exceeding $600 and imprisonment in the county jail for not more than two years.

passed (Acts of 1857, c. 157) giving police courts power to punish larcenies of property not exceeding $50 in value by imprisonment for no more than two years in jail or a house of correction or by a fine of not more than $100. See *Lewis* v. *Robbins*, 13 Allen, 552.

In the Revised Laws of 1902 provision for jurisdiction over petty larceny in the police courts and similar courts was continued (Revised Laws, 1902, c. 160, sec. 28) with the value of the property stolen increased from $50 to $100. That revision also eliminated punishment in the state prison for larceny of property not exceeding $100 in value, and established the present penalty (Revised Laws, 1902, c. 208, sec. 26). Jurisdiction was also continued in these summary courts and in a trial justice in cases of theft of property not exceeding $5 in value. They could impose punishments up to a $15 fine or six months in the house of correction. Revised Laws, 1902, c. 208, sec. 30. See *Commonwealth* v. *Gately*, 203 Mass. 598. In the revision of the laws of 1921 the police courts were abolished* and jurisdiction over all petty larceny, regardless of amount, was lodged in the District Courts, including the Third District Court of Eastern Middlesex, which tried the theft here involved.

The treatment of petty larceny as a trivial offense was not confined to Massachusetts. In Connecticut in 1784 the petty thief was classed with "the peddler and hawker" and subject to a 40 shilling fine by a justice of the peace. Frankfurter & Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," 39 Harv. L.R. 917, at 943. In *District of Columbia* v. *Clawans*, 300 U.S. 617, at 626, Justice Stone enumerated (in note 4) colonial laws

*Trial justices with jurisdiction over larceny of property not exceeding $10 had been limited to twelve towns (none within the jurisdiction of the Third District Court of Eastern Middlesex) by the Acts of 1917, c. 326, sec. 1. Trial justices were abolished by the Acts of 1953, c. 319, sec. 1.

imposing penalties up to six months' imprisonment for petty offenses. Among the laws there listed is chapter 40 of the Laws of 1785 of New York, which had as its purpose "Altering the mode of punishment in certain cases of petty larceny." See also Frankfurter & Corcoran, Appendix A, 39 Harv. L.R. 916, at 983.

It is true that the courts in the middle of the 19th Century have treated petty larceny as a felony (erroneously following Blackstone) in applying such technical rules as those regarding the competency of witnesses. *Commonwealth* v. *Keith*, 8 Met. 531. But the extreme technicality and irrelevancy of these rules seem obvious from such a case as *Utley* v. *Merrick*, 11 Met. 302, where a conviction of obtaining property under false pretenses was held not to disqualify a witness, although that seems just the type of crime which *Jordan* v. *De George*, 341 U.S. 223, intends to include within the ambit of moral turpitude. Cf. *Ex parte Wilson*, 114 U.S. 417, at 423. The rule regarding the disqualification of witnesses has been abolished in Massachusetts (see General Laws, c. 233, sec. 21) and all misdemeanors are treated alike in their bearing on credibility. See *Rosen* v. *United States*, 245 U.S. 467.

Not only legislatures, but others who have dealt with crime have distinguished petty larceny from serious crimes. Thus the Bureau of the Census in 1904 in the Census of Prisoners and Juvenile Delinquents in Institutions, p. 28, classifies petty larceny as a minor crime, stating with respect to its classifications:

> "All crimes that are universally held to be of a grave nature, regardless of how they happen to be punished in individual instances have invariably been classified as major offenses. Among them are the most aggravated forms of offense against chastity . . . perjury, counterfeiting and various violations of the United

States laws, all the specified crimes against the person, and arson, burglary, forgery and embezzlement among the specified crimes against property. *The rule has been followed of classifying larceny and a number of other offenses which may or may not be of a serious nature as minor offenses when the term of imprisonment was not for more than one year.*"* (Emphasis ours.)

This statement is quoted by the Immigration Commission in its Report on Immigration and Crime, 36 Reports of the Immigration Commission, p. 215, Senate Document 750, 61st Cong., 3d Sess. 1910. The reports of this Immigration Commission, it is stated by the Government in its brief in *Jordan* v. *De George,* p. 11, were the basis for the Immigration Act of 1917, which for the first time provided for deportation of aliens convicted of crimes involving moral turpitude.

Jerome Hall has pointed out that petty larceny is not regarded as a serious crime. Hall, Theft, Law and Society (1st ed.) pp. 307-308. He states at page 307:

> "It is necessary here only to point out that, whatever effect is produced on the public by the theft of very large sums of money, it is certain that—to state it rather directly—no wave of moral indignation surges forth when petty thefts are committed."

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*The Federal Bureau of Investigation in its Uniform Crime Reports also makes a distinction between larceny over $50 and larceny of $50 or less. This, however, may not be of particular significance since the offenses enumerated by the F.B.I. are used primarily because they are generally reported by the victim, while such offenses as fraud, forgery and sex offenses are not so generally reported. Ronald H. Beattie, Manual of Criminal Statistics, 1950, prepared for the Committee on Research and Planning, American Prison Association, p. 6.

There have been very few cases, so far as we could find, in which it appears that a court has actually permitted the deportation of an alien on the basis of a conviction of petty larceny. The only Circuit Court of Appeals case we have been able to find is *Tillinghast* v. *Edmead*, 31 F. (2d) 81, in the First Circuit, in which Judge Anderson dissented, agreeing with Judge Morton of the District Court, who had also taken the position that petty larceny does not necessarily involve moral turpitude. *Ex parte Edmead*, 27 F. (2d) 438. The only other cases we have been able to find are three cases in the Western District of New York: *United States ex rel. Chartrand* v. *Karnuth*, 31 F. Supp. 799; *United States ex rel. Fracassi* v. *Karnuth*, 19 F. Supp. 581, 1937; and *United States ex rel. Patricola* v. *Karnuth*, 9 F. Supp. 961, 1935—and one case in the Southern District of New York: *United States ex rel. Amato* v. *Commissioner*, 18 F. Supp. 480, 1937.*

Tillinghast v. *Edmead* merely follows Blackstone's classification of *malum in se* and *malum prohibitum*—a distinction which this court in *Gibbs* v. *Consolidated Gas Co. of Baltimore*, 130 U.S. 396, at 412, said has "long since been exploded." See *Jordan* v. *De George*, 341 U.S. 223, 237, note 10. Indeed, Blackstone himself is not consistent in his treatment of theft. See Note: "The Distinction between 'Mala Prohibita' and 'Mala in Se' in Criminal Law," 30 Col. L.R. 74, at 85, note 75. The irrelevance of Blackstone's distinction is striking when it is noted that he apparently classifies drunkenness as *malum in se*. 4 Blackstone, 42.

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*In *Wilson* v. *Carr*, 41 F. (2d) 704 (C.C.A. 9th), and *United States ex rel. Rizzio* v. *Kenney*, 50 F. (2d) 418 (D.C. D. Conn.), aliens were held not deportable for other reasons, the courts assuming with little or no discussion that petty larceny of which they had been convicted was a crime involving moral turpitude. There are also a few exclusion cases holding that petty larceny is a crime involving moral turpitude. See *United States ex rel. Ulrich* v. *Kellogg*, 30 F. (2d) 984 (App. D.C.)

The Board of Immigration Appeals has referred to petty larceny as a "minor infraction" (*In the Matter of V— I—*, 3 I. & N. Dec. 571, at 573, but has held that it involves moral turpitude, probably on the theory that the turpitude somehow inheres in the intent. The Hornbook definition of larceny includes, of course, "the intent unlawfully to deprive the [owner] permanently of the use of it." *Rich* v. *United Mutual Fire Insurance Co.*, 328 Mass. 133. General Laws (Ter. Ed.) c. 277, sec. 39. But that is a bare intent to do the prohibited act—in this case to pilfer a dozen golf balls (Holmes, Common Law, pp. 70-72 (Boston, 1881)), and it is this act which must be evaluated. *United States ex rel. Iorio* v. *Day*, 34 F. (2d) 920, at 921 (C.C.A. 2d). *United States* v. *Perplies*, 165 F. (2d) 874 (C.C.A. 7th). The act, moreover, must be judged by the statute forbidding it and the court record (R. p. A57). These and only these must indicate its character. *United States ex rel. Guarino* v. *Uhl*, 107 F. (2d) 399 (C.C.A. 2d). *United States ex rel. Manzella* v. *Zimmerman*, 71 F. Supp. 534 (D.C. E.D. Pa.) (and cases cited). *United States ex rel. Giglio* v. *Neelly*, 208 F. (2d) 337 (C.A. 7th).

Larceny generally, and even petty larceny, may conceivably be an atrocious crime, but it may also be committed by a person who takes another's property in payment of a small debt though knowing that the specific property does not belong to him. *Commonwealth* v. *Stebbins*, 8 Gray, 492, 496. From the record in this case there is no way of telling where in the moral scale the pilfering of twelve golf balls stands. But the cases cited above indicate it must be judged by the most venial of crimes within the gamut covered by the statute.

The futility of trying to work out a general definition of moral turpitude that will not be vague and unworkable is pointed out in the dissenting opinion of Justice Jackson in *Jordan* v. *De George*. The court in that case did not attempt

such a definition but saved the phrase "moral turpitude" from this attack by carving out a category of crimes—those involving fraud—which, it held, were encompassed within that term. The crimes in issue in that case were felonies involving large amounts, so that it would appear that, whatever else moral turpitude means, felonies involving fraud are crimes involving moral turpitude.

The category thus carved out obviously does not include petty larceny; and, it is submitted, no such category can be carved out to include petty larceny which will be consistent with Congressional intent and based on a formula certain enough so that an alien will know the terrible sanction which will accompany his misstep and so that an alien brought before a state or federal court on a criminal charge can tell whether he can plead guilty and accept a relatively light sentence without fear of deportation, or whether (if the Government's contention as to the meaning of "conviction" is upheld) he can safely allow a charge to be disposed of by a finding of guilt and probation. Further, such a formula must provide a guide for lower courts as well as the executive branch.

The lack of an objective criterion will be much more serious if the view of the court below is adopted that a sentence to imprisonment is no longer required under the Immigration and Nationality Act. Previously, whatever moral turpitude might mean, a crime on which deportation could be based had to be of such a nature as to impel a court actually to impose a sentence of at least one year's imprisonment. *United States ex rel. Robinson* v. *Day*, 51 F. (2d) 1022 (C.C.A. 2d). But on the interpretation of "convicted" urged by the respondent the crimes hereafter coming before the courts for analysis in deportation proceedings will include a host of minor delinquencies which trial courts have not even felt to require punishment.

The Government in its brief in *Jordan* v. *De George* (pp. 9, 10) suggests that Congress, when it first introduced the

phrase "moral turpitude" into the immigration laws, meant infamous crimes. As the Government there indicates, the Act of March 3, 1891, 26 Stat. 1084, directed the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." The Government pointed to the accompanying House Report 3808, 51st Cong. 2d Sess. p. 2, which stated that the bill barred "persons who have been convicted of felony or other infamous crimes."

But the quality or character of the crime is determined by the punishment. *United States* v. *Moreland*, 258 U.S. 433, at 437. "Whether a crime is infamous within the meaning of the Fifth Amendment may be determined by the character of the punishment or by other incidents of the sentence prescribed" (p. 442). Rule 7(a) of the Rules of Criminal Procedure prescribed by this court, 323 U.S. 821, provides that crimes punishable by imprisonment not exceeding one year may be prosecuted by information and therefore are not infamous crimes. But when these rules were promulgated, the larceny of property not exceeding $50 in value of the United States (18 U.S.C. (1940 ed.) sec. 82) or within the jurisdiction of the United States (18 U.S.C. (1940 ed.) sec. 466; *cf.* Title 22, sec. 2202, District of Columbia Code (1951 ed.) or from a national or other such bank (12 U.S.C. (1940 ed.) sec. 588b(a)) was punishable by imprisonment not exceeding one year. This court in effect thus held that such petty larceny was not an infamous crime. In 1948, when Congress revised the Criminal Code, it confirmed the distinction raising the dividing point between petty and grand larceny to $100. 18 U.S.C. sec. 641. 18 U.S.C. sec. 661. 18 U.S.C. sec. 2113(b). *Cf.* Title 22, sec. 2202, District of Columbia Code, as amended by the Act of June 29, 1953, 67 Stat. 99. This is precisely the distinction made in the Massachusetts statute under which the petitioner was prosecuted. General Laws c. 266, sec. 30.

Indeed, from the analyses in *District of Columbia* v. *Clawans*, 300 U.S. 617, and Frankfurter & Corcoran in 39 Harv. L.R. 917, it would seem that petty theft is the type of offense which Congress could, consistent with article III, sec. 2, cl. 3, of the Constitution, treat as a petty offense rather than a "crime." *District of Columbia* v. *Colts*, 282 U.S. 63.

The Government in its brief in *Jordan* v. *De George* (p. 6) also suggests that crimes involving moral turpitude are "serious penal offenses." This is hardly sufficient to warn the alien or provide a standard for administrators and courts. See *Jordan* v. *De George*, dissenting opinion, at page 235. However, the legislative history of the Immigration Act of 1917, which first made crimes involving moral turpitude grounds for deportation, indicates that Congress did not intend to include trivial offenses. The Senate Report No. 352, 64th Cong., 1st Sess., in commenting on this new provision for deportation of aliens, states:

> "When the act was passed as H.R. 6060 it contained a new provision (still retained, p. 43, lines 1-6) for the deportation of aliens who commit serious crimes within five years after entry . . . As the act now stands, the House has added, at the suggestion of its committee (volume 53, CR pp. 5932-3) a provision intended to reach the alien who after entry shows himself to be a criminal of the confirmed type, such aliens to be deported without limitation of time after entry when they commit a second *serious* offense." (Emphasis ours.)

This was the understanding throughout the debate on the present Immigration and Nationality Act. The main criticism of the bill reported by the Senate Committee on the Judiciary, S. 2550, with respect to deportation of crim-

inal aliens was the provision (at page 109) making deportable (in addition to those convicted of crimes involving moral turpitude) aliens "convicted in the United States of any criminal offense not comprehended within any of the foregoing, if the Attorney General in his discretion, concludes that the alien is an undesirable alien of the United States."

The objections to this provision were precisely that it would make deportable aliens who had been convicted of minor crimes. Senator Humphrey, one of the leaders of the opposition to the bill, introduced an amendment which was accepted by Senator McCarran (98 Congressional Record, p. 5758) restricting deportability of criminal aliens to those convicted of crimes involving moral turpitude. It is clear that he and his supporters thought that the use of this phrase barred and would continue to bar deportation for minor crimes. In the debate the following colloquy occurs (98 Congressional Record, 5316):

> "Mr. Lehman: Does not the senator from Minnesota agree that under the McCarran bill a crime involving moral turpitude need not be the basis for such deportation but any minor crime or misdemeanor would be sufficient. . . .
>
> "Mr. Humphrey: That is correct. Mr. President, this provision of the bill is a scandalous one."

Senator Kefauver, whose Crime Commission had been investigating crime among the foreign born, joined Senator Humphrey in opposing the original provision in S. 2550 on the ground that it permitted deportation for crimes which were not felonies. It was his understanding that "crimes involving moral turpitude" meant felonies. Cf. *United States* v. *Perplies*, 165 F. (2d) 874 (C.C.A. 7th) (Minton, J.). Senator Kefauver stated (98 C.R. p. 5334):

"We found recently as set forth in the report of the Crime Investigating Committee that there were provisions of law requiring that a person be convicted of two felonies before he could be deported from the United States. The committee recommended that conviction of one felony plus a finding by the attorney general that there was no likelihood of the person becoming a good citizen should be sufficient for purposes of deportation.

"However, as I understand, the pending bill goes much further and provides that if a person is convicted of any kind of crime he may be deported." *

But whatever the explanation of moral turpitude, it seems clear from the legislative history of the revision of the Criminal Code in 1948, 18 U.S.C., that Congress did not intend that phrase to include petty larceny not exceeding $100. In that revision Congress classified all crimes into three classes. Two of these classes are felonies—offenses which "become a very serious matter for society." Representative John M. Robison, at the hearings before subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H.R. 1600 and H.R. 2055, 80th Cong. 1st Sess. p. 4. For the most serious of these offenses, prison penalties exceeding five years were established. For the class of lesser felonies (including simple larceny of property over $100 within the territorial jurisdiction of the United States, 18 U.S.C. sec. 661) Congress with minor exceptions established maximum prison penalties of five years. For crimes which Congress considered minor, it assigned a maximum prison penalty of one year. The revisor's notes, page A4, Appendix to House Report No. 304, 80th Cong., describes this classification as follows:

*See also 98 Congressional Record, p. 5212.

"Reconciliation of punishment provisions.—A comparative study was made of the penalty provisions of all offenses enumerated in part I of this title. In attempting to reconcile inconsistent and incongruous punishments for offenses involving the same degree of moral turpitude, the following criteria were generally observed.

"1. Heinous felonies: For a felony involving a high degree of moral turpitude, such as treason, murder, kidnapping, robbery, etc., a severe penalty was considered justified.

"2. Ordinary felonies: For a felony involving a lesser degree of moral turpitude than a heinous felony, a maximum imprisonment of 5 years was adopted. At present numerous statutes, such as the National Motor Vehicle Theft Act and the White Slave Traffic Act, carry the 5-year imprisonment penalty, while fraud, filing false statements, etc. carry a 10-year imprisonment penalty. These discrepancies seem incongruous, especially when it is remembered that the maximum penalty is rarely imposed.

"3. Offenses mala prohibita: For violations of regulatory statutes, constituting mala prohibita, a maximum imprisonment penalty of 1 year seemed adequate. This prevents the stigma and consequence of a felony conviction from attaching to the defendant and, on the other hand, would facilitate and expedite prosecutions by making it possible to prosecute by information. Moreover, juries frequently are reluctant to convict any defendants if they know the potential maximum penalty is excessive, although it is seldom imposed in actual practice."

Thus, among the crimes which, Congress felt, did not involve any moral turpitude at all, and therefore were as-

signed maximum imprisonment penalties of one year, is included precisely the type of petty larceny which the Government seeks to use as a basis for deportation. As set out above, Congress in this revision of the Criminal Code made theft of property not exceeding $100 in value punishable by a maximum imprisonment penalty of one year if the property was stolen within the territorial jurisdiction of the United States (18 U.S.C. sec. 661; *cf.* Code of District of Columbia, Title 22, sec. 2202, as amended) or even if it was stolen from the United States (18 U.S.C. sec. 641) or from a national or other such bank (18 U.S.C. sec. 2113(b)). Congress did not even feel that the disabilities flowing from a felony conviction should apply to such pilfering.

It is submitted that, particularly in the light of the Criminal Code, something more definite than the phrase "moral turpitude" is required to impute to Congress an intent to impose the penalty of banishment on the basis of minor infractions of this type. The Government in its brief in opposition, p. 13, admits that its interpretation could lead to "harsh and oppressive results." Indeed, the penalty is so disproportionate to the offense (cf. *Weems* v. *United States*, 217 U.S. 349) that the Government's interpretation raises the question whether the alien would not be subjected to cruel and unusual punishment in violation of the Eighth Amendment or of due process insofar as it includes the principles of the Eighth Amendment.

III.

Section 241(a)(4) of the Immigration and Nationality Act is not applicable to crimes and convictions which occurred before the effective date of the Act.

"Is convicted" in section 241(a)(4) is a specific prospective designation precluding retrospective interpretation of

this provision. This court has so held in construing similar language in the immigration laws, *Kessler* v. *Strecker*, 307 U.S. 22, and elsewhere, *Wallace* v. *Cutten*, 298 U.S. 229.

Kessler v. *Strecker*, moreover, alerted Congress to this specific problem and directly resulted in the amendment of the immigration laws. See *Bridges* v. *Wixon*, 326 U.S. 135.

Eichenlaub v. *Shaughnessy*, 338 U.S. 521, also indicates that a proper method of accomplishing retrospectivity is to use the words "have been or may hereafter be convicted," and this language is used in subsection 241(a)(17).

With these two cases in mind, it seems difficult to believe that, if Congress had intended a retrospective interpretation, it would not have used the language of subsection 241(a)(6) or 241(a)(7)—"is or at any time after entry has been"—or the language of subsection 241(a)(5) and subsection 241(a)(11)—"has been convicted"—or even subsection 241(a)(14), (15) and (16)—"shall have been convicted"—or the language of subsection 241(a)(17). In those sections the use of the past tense is understandable, since Congress was merely continuing in effect existing law. But in section 241(a)(4) Congress had made some changes—more or less drastic, depending upon whether our interpretation or that of the court below is accepted. Prospective operation is understandable in this subsection.

The court below points to the omission of the word "hereafter" in subsection 241(a)(4). "Is," however, when used in other subsections alone, without "hereafter," is still prospective. Thus in section 241(a)(11) "is, or hereafter at any time after entry has been, a narcotic drug addict" was, as the respondent conceded in the court below, intended to operate prospectively only. See House Report 1365, 82d Cong. 2d Sess. U.S. Code Congressional and Ad-

ministrative News, p. 1716; Senate Report 1137, 82d Cong. 2d Sess. p. 22. Here, "is" standing alone in the first part of the clause cannot mean "was heretofore."

The court below calls it an unlikely assumption that Congress would make certain future conduct the basis for deportation without making deportable similar conduct in the past. But that is exactly what Congress did in section 241(a)(11). Aliens who after the effective date of the Act have become drug addicts are deportable, even after they are cured, but aliens who became drug addicts before the effective date of the Act and were cured before that date are not deportable.

Nor is section 241(d) applicable. That section applies "except as otherwise specifically provided"; and Congress here deliberately, after *Kessler* v. *Strecker*, uses the present tense where it could easily have used the past, in a section where there are a multitude of tense distinctions and where "is" standing alone in section 241(a)(11) is used prospectively. If section 241(d) can operate to modify subsection 241(a)(4), it is a virtual invitation for the executive and judiciary to modify the subsections of section 241(a), picking and choosing as to which will operate retrospectively and which prospectively without reference to the language used. This, it is submitted, the Constitution itself forbids. *Wallace* v. *Cutten*, 298 U.S. 229.

Moreover, the primary purpose of section 241(d) seems to be to make sure that the Act covers aliens who entered before its effective date. The first part of section 241(d) was included in section 19(b) of the Immigration Act of 1917. The addition of the second part on which the court below relies is not mentioned anywhere in the legislative history among the changes made. The inference would be that the second part was merely meant to reinforce the first part. Thus in section 241(a)(2), making deportable an alien who had entered the United States without in-

spection, the second part makes certain that the "without inspection" will not be read prospectively, and thus make the entry read prospectively.

There are also other ambiguities which section 241(d) may have been enacted to cope with. Thus, apart from section 241(d) it is not clear that the past tenses, *e.g.*, section 241(a)(5) "has been convicted," refer to convictions before the effective date of the Act as well as before the deportation proceedings commenced.

Moreover, the interpretations here suggested harmonize section 241(d) with section 405(a), which provides in substance that, as to all "liabilities" or "acts" or "matters" before the effective date of the Immigration and Nationality Act, the old law shall apply unless "otherwise specifically provided." Thus, if the petitioner in the future is sentenced to more than one year for a single crime involving moral turpitude, he may be deportable under section 19(a) of the Immigration Act of February 5, 1917.

The legislative history also indicates that Congress intended section 241(a)(4) to apply prospectively. It is of some significance that in both the House and the Senate Reports (S.R. 1137, 82d Cong. 2d Sess. p. 21, and H.R. 1365, U.S. Code Congressional and Administrative News, 1952, p. 1715) the discussions of section 241(a)(4) use the present tense, never slipping into the past tense as would have been natural. Moreover, Representative Walter, who presented the bill in the House, indicates that the only new retrospective provision in the bill is section 241(a)(2) and that the other provisions which operate retrospectively were merely continuations of the old law. On the floor of the House (98 Congressional Record, pp. 4301-4302, April 23, 1952, 82d Cong. 2d Sess.) he read a protest against the bill from the C.I.O. which stated:

> "By abolishing existing statutes of limitation and by creating and making retroactive new grounds for

deportation HR 5678 jeopardizes the status of the resident foreign born including immigrants whose admission into the United States under the Displaced Persons Acts was authorized by Congress and supported by the C.I.O."

Representative Walter commented as follows:

"Of course, HR 5678 does not do that. The Internal Security Act does and the Internal Security Act is a part of the law of the land today. It is restated, that is true, in this bill. This is because we are trying to put together for the first time since 1802 all the statutes relating to immigration and naturalization. It does, however, cover the situation where an alien succeeds in hiding in the United States. If that man is successful for five years his status can be adjusted. Your committee felt this was wrong. We felt that there should not be a premium placed on the ability of an alien to conceal himself. Under the provisions of this new bill where such a situation exists that alien is deportable."

IV.

THE COURT BELOW SHOULD HAVE DECLARED THE DEPORTATION ORDER VOID BECAUSE IT WAS BASED ON PROCEEDINGS CONDUCTED IN VIOLATION OF PROCEDURAL DUE PROCESS AND OF THE REQUIREMENTS OF THE IMMIGRATION AND NATIONALITY ACT AND THE REGULATIONS ISSUED THEREUNDER.

Because the court below reached the conclusion that the alien was deportable as a matter of law, it refused to consider that the deportation order is based on proceedings which violated the requirements of procedural due process

as well as the procedural requirements of the Act and Regulations. But the question before the court was whether the order of deportation was valid, not whether the petitioner was deportable. The petitioner has the right to have that latter question determined by the Special Inquiry Officer (8 C.F.R. sec. 242.61) acting as a judicial, not an investigating officer (sec. 242(b) of the Act).

The Special Inquiry Officer did not, in fact, consider he was acting in a judicial capacity. For example, he asked (R. p. A17) how many times the petitioner had been arrested. On objection by counsel he stated:

> "A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act."

The Special Inquiry Officer placed in the record Federal Bureau of Investigation reports (Exhibits 4 and 4(a), R. pp. A45, A50) containing "investigative leads" (R. p. A25), and overruled objections to these reports (R. pp. A24, A33) on the ground that they were "cumulative evidence" (R. p. A25). He also admitted Exhibit 3, a report of the petitioner's criminal record (R. pp. A26, A43). This the Board of Immigration Appeals felt important enough to append to its decision (R. pp. A77, A93).

The Special Inquiry Officer states (R. p. A70) that he considered in his decision "the transcript of hearings and the exhibits made a part of the record." These exhibits were obviously irrelevant and the grossest hearsay. Apart from the violations of the petitioner's right to a fair hearing under the Fifth Amendment, the admission and consideration of these exhibits violated the Regulations which provide that the Special Inquiry Officer "shall conduct a

fair and impartial hearing" (8 C.F.R. sec. 242.53(b)), and "shall exclude from the record any evidence that is irrelevant, immaterial or unduly repetitious" (sec. 242.53(b)), and section 242(b) of the Act providing that "the alien shall have a reasonable opportunity to examine the evidence against him and to cross-examine witnesses presented by the Government," an injunction against hearsay evidence.

Nor is it an answer to say that the questions involved in this proceeding were primarily questions of law. Such questions also require unbiased consideration. This is recognized by every judge of an appellate court deciding only questions of law who has at one time or another disqualified himself. It is obviously impossible to tell the degree to which the Special Inquiry Officer was influenced in his decision by these exhibits, termed by the District Court (R. p. A113) "of a highly incendiary character."

Nor was the result reached by the court below inevitably the result the Special Inquiry Officer had to reach. Indeed, the Special Inquiry Officer seems to have taken a somewhat different view of the applicable law from that which the court took. He seems to have relied on Massachusetts law (R. p. A67), as did the Board of Immigration Appeal (R. p. A77), rather than on a general federal law. An unbiased judicial analysis of Massachusetts law, we submit, would have yielded a finding that the petitioner was not deportable.

Apart from the question of procedural due process, the decision of the court below to refrain from inquiring into the procedural basis of the deportation order is inconsistent with the assumption in *Bilokumsky* v. *Tod*, 263 U.S. 149, "that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." See also *Bridges* v. *Wixon*, 326 U.S. 135; *United States ex rel.*

Accardi v. *Shaughnessy*, 347 U.S. 260, and *Handlovitz* v. *Adcock*, 80 F. Supp. 425 (D.C. E.D. Mich.).*

The Senate Judiciary Committee too has indicated its opinion that the courts will participate in the administration of the Immigration and Nationality Act through active enforcement of the Attorney General's Regulations. In Senate Report 1515, p. 624, it is stated with reference to regulations issued by the Attorney General:

> "These regulations have the force and effect of law and are binding upon the immigration authorities. Their non-observance might invalidate the entire hearing even though no actual prejudice to the alien is shown."

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed with directions that the order discharging the writ of habeas corpus and dismissing the petition be vacated and that the petitioner be discharged.

Respectfully submitted,

PAUL T. SMITH,
REUBEN GOODMAN,
MANUEL KATZ,
209 Washington Street,
Boston 9, Massachusetts,
JACOB SPIEGEL,
1 State Street,
Boston 9, Massachusetts.

*See *Couto* v. *Shaughnessy*, C.A. 2, decided January 20, 1955, in which the court said: "There is no dispute as to the facts above stated. Obviously the appellant is deportable and the order directing deportation is unassailable *unless there was some fatal defect in the administrative proceedings in which it was entered.*" (Emphasis ours.)

APPENDIX A.

Excerpt from Fifth Report of the Judicial Council* of Massachusetts, 1929, Public Document No. 144 (reprinted in 15 Mass. Law Quarterly (2), December, 1929, p. 29).

4. Definition of Final Conviction in Cases of "Driving under the Influence of Intoxicating Liquor."

The Administrative Committee of the District Courts has requested us to recommend a new section in General Laws, Chapter 90, as finally amended by the Acts of 1928, Chapter 281. Section 24 *inter alia* makes it an offense for a person to operate a motor vehicle while under the influence of intoxicating liquor and requires a magistrate or other officer authorized to receive complaints before reducing a complaint to writing charging a person with having operated a motor vehicle while under the influence of intoxicating liquor to communicate with the office of the

*The Judicial Council is established under General Laws (Ter. Ed.) c. 221, sec. 34A: "There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine."

Registrar of Motor Vehicles and inquire as to whether there is in said office any record or other information tending to show that such person has been finally convicted of a like offence by a court or magistrate of the Commonwealth within a period of six years immediately preceding the commission of the offence with which he is charged. It further provides that if it shall appear that such person has been so convicted, the complaint shall contain an averment to that effect specifying the court or magistrate and the date of conviction. There is further provision that in case of a conviction of a person thus operating a motor vehicle, if the offence is committed within a period of six years immediately following a final conviction of like offence, that the case shall not be placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceeding, nor the sentence be suspended. There is further provision that for the offence of operating a motor vehicle while under the influence of intoxicating liquor committed within a period of six years as aforesaid the punishment shall be not less than one month nor more than two years.

Considerable difficulty has been encountered in the proper interpretation to be given to the words "final conviction" or "finally convicted" as above used. There are a number of statutes where the penalty to be imposed for a second offence is more severe than for a first conviction. In all such cases the averment of the prior conviction in the complaint or indictment is an essential element of the description of the offence. It is necessary that the record of the court showing the prior conviction and the identity of the defendant be proven unless the defendant confesses it. Therefore such court records should show with technical accuracy the prior conviction.

It has been held in *Attorney General* vs. *Pelletier, 240 Mass.*, at pages 310-311, the word "conviction" implies "a

judgment and sentence of the court upon a verdict or confession of guilt" and that "a mere verdict of guilty is not enough."

"Nothing less than a final judgment conclusively establishing guilt will satisfy the meaning of the word 'conviction' as here used."

See likewise *Mariano* vs. *District Court Judge, 243 Mass. 90.*

In this sense there is no final judgment when the sentence is suspended and the defendant placed on probation upon such terms and conditions as the court shall determine with a continuation of the case to a definite date.

See General Laws, chapter 279, section 1, as amended by statute 1924, chapter 175, and *Finer* vs. *Commonwealth, 250 Mass. 493.*

During the probationary period the defendant may be surrendered and dealt with by the court, may be sentenced or some other lawful disposition be made of the case. At the expiration of the period of probation the suspension and probation orders may be further continued, or if it appears that the defendant has fully performed and kept the conditions and "the objects of the probation seem to have been accomplished in such a way as not to require any punishment either for his own reformation or in the interests of the public, the court may finally dispose of the case by dismissal of it."

See *Marks* vs. *Wentworth, 199 Mass. 94. Mariano* vs. *District Court Judge, 243 Mass. 90.*

It seems to follow, therefore, that so long as a defendant is under a suspended sentence and probation he is before the court on a continuance and the case is still a pending one and there can be no record of a final conviction. When the case is ripe for final disposition the court, under and by authority of the cases and statutes above cited, may either

dismiss it, affirm or reduce the sentence or make any other proper disposition that ought to be made. Commonly this disposition has been in effect an order that the probation and suspension orders be revoked and the case filed but certain judges have held and it is believed properly in view of the decisions in this Commonwealth that such a disposition is not a final conviction. It does not seem possible to decide upon a formula which will be satisfactory for the purpose and that will accomplish the end sought. Therefore in order to clarify the situation, the Administrative Committee has recommended as aforesaid that a new section be added, to be inserted after Section 24A, and to be captioned 24B, which we recommend as follows:

Section 24B. For the purposes of Section 24 as amended by Section 1 of chapter 274 of the Acts of 1929, a person shall be held to have been finally convicted of driving a motor vehicle while under the influence of intoxicating liquor if he shall have pleaded *nolo contendere* or shall have been found or adjudged guilty by a Court of competent jurisdiction notwithstanding he shall have been placed on probation with or without sentence or the sentence shall have been suspended or the case placed on file provided always that no appeal or bill of exceptions shall be pending.*

*This recommendation of the Judicial Council was not adopted. By the Acts of 1936, c. 434, sec. 1, which rewrote General Laws (Ter. Ed.) c. 90, sec. 24, it is now provided that probation without sentence or placing a case on file after plea or finding of guilty or plea of nolo on a charge of drunken driving is sufficient for revocation of a driver's license. General Laws (Ter. Ed.) c. 90, sec. 24(1)(*d*). Note that this did not alter the requirement of sentence in the case of revocation of a driver's license for negligent driving, leaving the scene of an accident, etc. General Laws (Ter. Ed.) c. 90, sec. 24(2)(*b*).

APPENDIX B.

Constitutional Provisions, Statutes and Regulations.

United States Constitution, Art. III, Sec. 2, Cl. 3.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Un' ed States Constitution, Eighth Amendment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Immigration and Nationality Act, Public Law 414, June 27, 1952.

SECTION 212(a)(9), 66 STAT. 182, 8 U.S.C. SEC. 1182(a)(9).

GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND EXCLUDED FROM ADMISSION

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . . . .

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; . . .

SECTION 241(a), (b) AND (d), 66 STAT. 204-208, 8 U.S.C. SEC. 1251(a), (b) AND (d).

CHAPTER 5—DEPORTATION; ADJUSTMENT OF STATUS

GENERAL CLASSES OF DEPORTABLE ALIENS

SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States.

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (c) of this title, or under section 36 (c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or has been convicted under section 1546 of title 18 of the United States Code;

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

. . . . . .

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a), . . .

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there . . .

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing . . .

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a); or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon . . .

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: . . . has been convicted of any offense against section 13 of the Penal Code of the United States committed during the period of August 1, 1914, to April 6, 1917, . . .

(18) has been convicted under section 278 of this Act or under section 4 of the Immigration Act of February 5, 1917.

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

. . . . . .

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all

aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

SECTION 242(b), 66 STAT. 209, 8 U.S.C. SEC. 1252(b).

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

. . . . . .

SECTION 242(h), 66 STAT. 208, 8 U.S.C. SEC. 1252(h).

(h) An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

SECTION 405(a), 66 STAT. 280, 8 U.S.C. SEC. 1101, NOTE.

SAVINGS CLAUSE

SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, condi-

tions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . .

Immigration Act of February 5, 1917.

SECTION 3, 39 STAT. 875.

SEC. 3. That the following classes of aliens shall be excluded from admission into the United States: . . . Persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; . . .

SECTION 19(a), 39 STAT. 889, AS AMENDED BY 54 STAT. 671.

DEPORTATION OF UNDESIRABLE ALIENS GENERALLY

That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; . . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: . . . *Provided further,* That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such de-

portation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: Provided further, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States: . . .

[These functions were transferred to the Attorney General by Reorganization Plan V, 54 Stat. 1238.]

SECTION 19(b), 54 STAT. 671.

(b) Any alien of any of the classes specified in this subsection, in addition to aliens who are deportable under other provisions of law shall, upon warrant of the Attorney General, be taken into custody and deported:

(1) . . .

(2) . . .

(3) Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.

(4) Any alien who, at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940.

(5) Any alien who, at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940.

No alien who is deportable under the provisions of paragraph (3), (4), or (5) of this subsection shall be deported until the termination of his imprisonment or the entry of an order releasing him on probation or parole.

Act of May 26, 1922.

SECTION 2(e), 42 STAT. 596.

(e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens . . ."

[These functions were transferred to the Attorney General by Reorganization Plan V, 54 Stat. 1238.]

Administrative Regulations Implementing the Immigration and Nationality Act (8 C.F.R.).

Sec. 242.53. . . .

. . . . . .

(b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing.

No decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of objections. . . .

(c) *Special inquiry officers; specific duties.* At the commencement of the hearing under this part, the special inquiry officer shall . . . (4) advise the respondent that he will have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government, . . .

Sec. 242.61. *Decision of special inquiry officer*—(a) *Preparation of written decisions.* . . . the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability, . . . The decision shall be concluded with the order of the special inquiry officer as provided in paragraph (c) of this section.

(b) . . .

(c) *Order of special inquiry officer.* The order of the special inquiry officer shall be (1) that the alien be deported, or (2) that the proceedings be terminated, or (3) that the alien's deportation be suspended, or . . .

(d) . . .

(e) *Finality of order.* The order of the special inquiry officer shall be final except when:

(1) . . .

(2) An appeal is taken to the Board of Immigration Appeals.

United States Code, Title 18, Crimes and Criminal Procedure.

§ 1. OFFENSES CLASSIFIED.

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

. . . . . .

§ 3651. SUSPENSION OF SENTENCE AND PROBATION.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

. . . . . .

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

. . . . . .

§ 3653. REPORT OF PROBATION OFFICER AND ARREST OF PROBATIONER.

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

. . . . . .

§ 3655. DUTIES OF PROBATION OFFICERS.

The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers

and to bring about improvements in their conduct and condition.

. . . . . .

Rules of Criminal Procedure.

RULE 7. THE INDICTMENT AND THE INFORMATION.

(a) USE OF INDICTMENT OR INFORMATION.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

. . . . . .

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

. . . . . .

RULE 32. SENTENCE AND JUDGMENT.

. . . . . .

(b) JUDGMENT. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. . . .

CHAPTER 218.

SECTION 26. District courts shall have original jurisdiction, concurrent with the superior court, of the following offences committed within their respective districts or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except conspiracies and libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections eighteen and nineteen of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged, if in either case the sum of money or the value of the property named in such note or orders does not exceed fifty dollars.

. . . . . .

SECTION 38. . . . Subject to any other provisions of law relative to the filing of complaints for particular crimes, district courts may place on file any complaint in a criminal case other than . . .

CHAPTER 265.

SECTION 23. Whoever unlawfully and carnally knows and abuses a female child under sixteen shall be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in any other penal institution in the commonwealth.

CHAPTER 266.

SECTION 30. (1) Whoever steals . . . the property of another . . . shall be guilty of larceny, and shall, if the

value of the property stolen exceeds one hundred dollars be punished by imprisonment in the state prison for not more than five years or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen does not exceed one hundred dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars; . . . [As amended by St. 1945, c. 282, sec. 2.]

CHAPTER 274.

SECTION 1. A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

CHAPTER 276.

SECTION 87. The superior court may place upon probation under any of its probation officers any person before it charged with crime and any court may place any person convicted before it in the care of its probation officer for such time and upon such conditions as it deems proper; provided, that no person convicted of a felony by a district court shall be placed on probation by said court in such case if it shall appear that he has been previously convicted of any felony; . . .

CHAPTER 278.

SECTION 18. Whoever is convicted of a crime before a district court or trial justice may appeal to the superior court, and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered in the

superior court on the return day next after the appeal is taken, and the appellant shall be committed to abide the sentence of said court until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court or trial justice requires, . . .

. . . . . .

SECTION 25. The appellant may, at any time before the next sitting of the superior court for criminal business and at any time thereafter if no action shall have been taken by the superior court except continuance, come personally before the court or trial justice from whose judgment the appeal was taken and withdraw his appeal. (As amended by St. 1937, c. 311.)

CHAPTER 279.

SECTION 1. When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix. . . . [As amended by St. 1934, c. 205, sec. 1.]

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 333

ANTHONY PINO, PETITIONER

v.

H. R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 128–143) is reported at 215 F. 2d 237. The opinion of the District Court (R. 104–114) is reported at 119 F. Supp. 122.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1954 (R. 143). The petition for a writ of certiorari was filed on September 9, 1954, and was granted November 8, 1954 (R. 144). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a case placed "on file" under Massachusetts practice—after a verdict of guilty, a suspended sentence to imprisonment, and a probationary period—involves a "conviction" within the meaning of Section 241 (a) (4) of the Immigration and Nationality Act of 1952.

2. Whether a conviction for petit larceny based on the theft of twelve golf balls constitutes a conviction for a crime involving moral turpitude under Section 241 (a) (4) of the Immigration and Nationality Act of 1952.

3. Whether the fact that petitioner's convictions occurred prior to the effective date of the Immigration and Nationality Act excludes them from the scope of Section 241 (a) (4) of that Act.

4. Whether the deportation order was vitiated by procedural errors.

STATUTE INVOLVED

Specifically applicable are Sections 241 (a) (4) and (d) of the Immigration and Nationality Act of 1952 (66 Stat. 204, 208; 8 U. S. C. 1251 (a) (4) (d), which in pertinent part provide:

> (a) Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) * * * at any time after entry is convicted of two crimes involving moral

turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Additional portions of the Immigration and Nationality Act of 1952 are set forth in the Appendix, *infra*, pp. 52–60.

STATEMENT

On December 18, 1953, the petitioner was taken into custody by the District Director of the Immigration and Naturalization Service of the Department of Justice, pursuant to an order of deportation issued on a finding that he had twice been convicted of crimes involving moral turpitude (R. 3). Contending that this order was invalid, the petitioner, on the same day, December 18, 1953, filed a petition for a writ of habeas corpus (R. 1, 2–12). The District

Court issued the writ, held a hearing, and on February 1, 1954, entered an order discharging the writ and dismissing the petition (R. 104). The order was affirmed by the Court of Appeals on August 2, 1954 (R. 143).

The evidence against the petitioner, as found by the Special Inquiry Officer (R. 64–74) and the Board of Immigration Appeals (R. 76–95), is as follows:

Petitioner, an alien, was born in Italy in 1907. He was admitted to the United States in 1908 for permanent residence and has maintained residence in the United States since that time.

In December, 1948, in a district court of the Commonwealth of Massachusetts, petitioner was charged with having stolen twelve golf balls. He entered a not guilty plea but was found guilty and sentenced to one year in the House of Correction. Appeal was taken on December 27, 1948, but withdrawn on December 28 by leave of court, and a motion for new trial was filed and allowed. On retrial on January 4, 1949, a judgment of guilty was entered and sentence of one year in the House of Correction was imposed. An appeal was filed on January 10, 1949, but withdrawn January 28 by leave of court and the sentence was suspended and petitioner was placed on probation. On January 30, 1950, the sentence was

revoked and the case placed "on file." (See Exhibit 5, R. 57–58, 18–19.)[1]

It was also shown that earlier, in January, 1928, petitioner had been indicted by a grand jury in Suffolk County, Massachusetts, for abuse of a female child. He entered a plea of not guilty and was sentenced to be committed in a Massachusetts Reformatory for a period of five years and one day (Exhibit 6, R. 59–60, 19). The warrant of arrest in the deportation proceeding had charged a prior conviction for rape, but at the hearing it developed that the conviction was for abuse of a female child. A new charge was lodged during the hearing to conform to the actual facts as proved (R. 20) and the Inquiry Officer granted an adjournment to give petitioner additional time to respond.

During the deportation hearing, the Special Inquiry Officer asked petitioner how many times he had been arrested (R. 17). He also offered, as exhibits in the proceeding, over petitioner's objection, a photostatic report of the Massachusetts Board of Probation (R. 17–18, 43) and a report from the Identification Division of the Federal Bureau of Investigation (R. 18, 45–55), showing a long history of arrests.

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[1] As certified, the notation "appeal waived" appeared to be as of January 30, 1950. It was stipulated, however, that appeal was waived on January 28, 1949 (R. 102–103).

SUMMARY OF ARGUMENT

I

Section 241 (a) (4) of the Immigration and Nationality Act of 1952 calls for the deportation of an alien who, after entry, "is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." Although petitioner was found guilty of petit larceny, was sentenced to one year of imprisonment and placed on probation for that year, and was actually under probation for the year, he argues that he was not "convicted" as that term is used in Section 241 (a) (4), and that the entry, after the end of the year's probation, of the phrase "Sentence revoked. On file" imports under state law a lack of finality which prevents the judgment from being a "conviction". It is the position of the government that the courts below were correct in concluding that the incidents of the "on file" entry under state law do not prevent it from being a conviction within the scope of the federal statute.

The general meaning to be assigned to the word "convicted" as used in a federal statute dealing with a subject over which Congress has plenary power must be resolved by reference to federal law. Cf. *United States* v. *Security Trust & Savings Bank, Executor,* 340 U. S. 47, 49; *Howard* v.

Commissioners, 344 U. S. 624. To the extent that the conviction takes place in a state court, the federal administrative agencies and the federal courts must necessarily look to what transpired in the state courts to determine whether what there occurred is in fact a "conviction" as that term is used in the federal Act. But it is the result, and not the labeling by the state, that determines whether a particular judgment is or is not a "conviction" for the purpose of the deporation laws.

The federal statute which provides for deportation of a person convicted of two crimes "regardless of whether confined therefor" makes it clear that the imposition of a term of imprisonment is not necessary to render a judgment a "conviction". In spite of petitioner's argument to the contrary, this language must have been designed to do more than overcome the effect of *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, where it had been held under the prior statute that "sentenced more than once" meant sentenced at two separate times. That specific problem is covered by the language of the statute providing for deportation on conviction of two crimes "regardless of whether the convictions were in a single trial". The separate phrase "regardless of whether confined therefor" was obviously designed to change the requirement of the former statute that there had to be, for two crimes, sentences to imprisonment for a year or

more. The same purpose also appears in Section 242 (h) which provides that deportation may be effected even though an alien is on probation. Normally, in federal law, a judgment suspending sentence or suspending execution of sentence is regarded as a "conviction". *Korematsu* v. *United States,* 319 U. S. 432.

While the statute does not make explicit the degree of finality which a judgment must have in order to be deemed a "conviction," it must be assumed that a judgment is not a "conviction" while it is subject to direct attack by the ordinary processes of appellate review. On the other hand, the term "convicted" cannot mean that a judgment is so final that there is no possibility that it may ever be vacated by some form of collateral attack. The correct interpretation of the word "convicted" in the statute is that adopted by the court below, that a person is deemed "convicted" after a judicial determination of guilt and a judgment which are no longer subject to the normal processes of appellate review.

The court below has found that the proceedings in the state court do meet this standard in that under Massachusetts law there was a judicial determination of guilt no longer subject to ordinary review. This should be conclusive under the rule, which this Court has reiterated many times, that it will "ordinarily accept the determination of local law of the Court of Appeals" of a partic-

ular circuit. *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U. S. 530, 534.

However, on a *de novo* examination of the question this Court should reach the same conclusion. What has happened to petitioner on the petit larceny charge meets the tests of a conviction as that term is used in the federal statute; he has been subjected to a final adjudication of guilt and the regular processes of appellate review are no longer open to him. Petitioner was placed on probation as the result of a finding of guilt after trial. He himself admits that the normal method for review of that adjudication is not now available to him. Under Massachusetts law, the time to appeal from the adjudication of guilt is at the time of sentence or not at all. *Mariano* v. *Judge of District Court,* 243 Mass. 90. The entry "Sentence revoked on file" after the year's probation, did not have the effect of wiping out the adjudication of guilt; it was "a mere suspending of active proceedings in the case." *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133, 136. Petitioner himself so recognized when, in January 1953, he made a motion for a new trial which was denied.

The situation where proceedings are suspended before any sentence has been imposed is different from that where the suspension occurs after a defendant has already been subjected to discipline. In the latter situation, as a practical matter, the "on file" entry is merely a method of stating that

the probationary period has been satisfactory and supervision may be terminated without further sentence, but without eradicating what has gone before. Since, therefore, the "on file" entry does not take away the force of what has gone before, it does not weaken the effect of the imposition of discipline on an adjudication of guilt as a "conviction" for the purposes of the federal statute.

Under the *Mariano* case, *supra,* it is doubtful whether petitioner would have a right of appeal in the unlikely event that the sentencing court should in the future remove the case from its "on file" status and impose sentence again. Even if there should be such a right, however, it cannot be said to be the normal process of appellate review. Although different in character, it would be more akin to a right of collateral attack on a judgment. Such a right, which is not in the normal process of review, even if it exists, will not defeat the final character of the adjudication for the purpose of deportation.

II

The conviction of petit larceny is a conviction of a crime involving moral turpitude. Petit larceny can and normally does carry the imputation of moral turpitude. The moral wrong in taking property of another does not differ with the success of the theft or the proficiency or industry of the thief. Courts which have had occasion to consider the problem have so held, not only in the context of the deportation statute, but in other con-

texts in which the term "moral turpitude" has historically been used, such as disbarment, revocation of licenses, slander, and impeachment of witnesses. This consistent interpretation over the years shows that larceny, even though designated petit, generally violates commonly accepted standards of morality. It is thus a crime involving moral turpitude as that term, with its "deep roots in the law" (see *Jordan* v. *De George*, 341 U. S. 223, 227), is used in the statute.

The court below was of the view that, even though it is conceivable that a particular act of stealing might not violate the normal, common standards of morality, the administrative officers have no authority to go behind the conviction and find that, under the particular facts of a case, a petit larceny conviction is not for a crime involving moral turpitude. This holding is supported by the weight of authority in the lower courts, but we do not deem it necessary to urge nor for this Court now to decide that question. It is sufficient for the purposes of this case that petitioner has not shown that his crime is an exception to the general rule that petit larceny normally involves moral turpitude. It must be conceded that the one issue which the immigration authorities and reviewing courts may not reconsider is the issue of guilt or innocence and there have been suggested no extenuating circumstances which would take this case out of

the general rule that stealing is a crime involving moral turpitude. The relevance of the bare fact that the stolen items consisted of twelve golf balls can only be that the crime was petit larceny. But, as is pointed out above, the fact that larceny is petit rather than grand is not of itself an extenuating circumstance.

III

Petitioner argues that, as a matter of statutory construction, the provisions of Section 241 (a) (4) making deportable an alien "who at any time after entry is convicted of two crimes involving moral turpitude * * * regardless of whether confined therefor" should be read to apply only to convictions occurring after the effective date of the Act. The answer to this contention is that Section 241 (d) explicitly declares that, unless otherwise specifically provided, the provisions of all of Section 241 (a) shall apply "notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." There is no specific language in Section 241 (a) (4), such as the precise word "hereafter" which occurs in subsections (3) and (11), to take it out of the retrospective reach of Section 241 (d) and the use of

the present tense is merely an example of standard statutory language.

The legislative history shows that Congress intended to facilitate deportation of alien criminals by the new Act. To read Section 241 (a) (4) as having only prospective application would be contrary to that Congressional purpose. In view of the fact that Congress, since 1917, has provided for the deportation of aliens convicted and sentenced to two crimes, it is evident that Congress did not, in 1952, intend to have Section 241 (a) (4) apply only to persons convicted of two crimes after 1952. Petitioner's argument that such persons would still be deportable under the prior Act by virtue of the savings clause of the 1952 Act, even if sound, does not apply to the situation where an alien has been convicted of one crime before 1952 and then is convicted of a second crime after 1952. Under petitioner's construction of the 1952 Act, such an alien would not appear to be deportable. Reading Section 241 (a) (4) and Section 241 (d) together, the construction which most clearly accords with the Congressional purpose is that Section 241 (a) applies to any two crimes committed by the alien at any time after his entry into the United States.

IV

Petitioner argues that the hearing was improper and that the hearing officer failed to act in a judicial capacity because he permitted the

introduction of records showing petitioner's long history of arrests. However, the presence of some irrelevant evidence in the record does not contaminate the entire proceeding. *Bilokumsky* v. *Tod*, 263 U. S. 149. The essential facts on which petitioner's deportability must be determined are matters of official record admitted by petitioner to relate to him. The issues as to whether the crimes for which he had been convicted involve moral turpitude arise here on undisputed facts and depend upon application of legal principles which are subject to review by the courts. Hence the admission of evidence of arrests could not have affected the essential issues resolved at the hearing.

ARGUMENT

Section 241 (a) (4) of the Immigration and Nationality Act of 1952 provides for the deportation of any alien "who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." Petitioner who has been adjudged guilty and sentenced for two crimes—abuse of a female child and petit larceny—concentrates his attack in this Court on the petit larceny conviction as a basis for deportation, arguing that it is neither a "conviction" nor a crime involving moral turpitude. He also con-

tends that the 1952 Act must be given a prospective construction making it inapplicable to convictions occurring before its enactment. And, finally, he attacks the validity of the administrative hearing on procedural grounds. We discuss each of these contentions.

I

PETITIONER WAS "CONVICTED" OF PETIT LARCENY AS "CONVICTED" IS USED IN SECTION 241 (A) (4) OF THE IMMIGRATION AND NATIONALITY ACT

As noted above, Section 241 (a) (4) provides for the deportation of a person convicted of two crimes involving moral turpitude "regardless of whether confined therefor." Although he was found guilty, was sentenced to one year imprisonment and placed on probation for that year, and actually served the probationary period, petitioner contends that he was not "convicted." He argues that the later entry (on January 30, 1950) "Sentence revoked On file" imports under state law a disposition of the case which prevents the judgment from being a "conviction." Both the District Court and the Court of Appeals of the circuit, whose decisions as to what the state law is, are, in the absence of clear error, entitled to be given conclusive weight by this Court, have determined that the incidents of the "on file" entry under state law do not prevent the disposition of petitioner's case from being a conviction as that term is used in the federal statute. It is the posi-

tion of the government that such a conclusion is not only reasonable, but correct, and hence that the judgements of the courts below on this issue should be affirmed.

A. THE GENERAL MEANING OF THE TERM "CONVICTED" IN THE NATIONALITY ACT MUST BE DETERMINED BY FEDERAL LAW

As the court below pointed out (R. 137), the general meaning to be assigned to the word "convicted", as used in this federal statute dealing with a subject over which Congress has very broad power,[2] must be resolved by reference to federal law. Cf. *United States* v. *Security Trust and Savings Bank,* 340 U. S. 47; *Howard* v. *Commissioners,* 344 U. S. 624; *United States* v. *Gilbert Associates,* 345 U. S. 361; *United States* v. *Acri,* No. 33 decided January 10, 1955. See also *Jerome* v. *United States,* 318 U. S. 101, 104.[3] To the extent that the conviction is had in a state court, the federal administrative agencies and the federal courts must necessarily look to what transpired in the state courts to determine whether what there occurred is in fact a "conviction" as that term is used in the federal statute. But it is

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[2] United States Constitution, Art. I, Sec. 8, cl. 4; *Chirac* v. *Chirac,* 2 Wheat. 259, 269; *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 587–588; *Galvan* v. *Press,* 347 U. S. 522, 530–1.

[3] The question presented was whether the state law, which made it a felony to utter forged promissory notes, or the federal law which did not make such an act a felony, should control the definition of "felony" as it was used in the Federal Bank Robbery Act (48 Stat. 783; 50 Stat. 749, 12 U. S. C. 588b). The court looked to the federal law.

the facts, and not the labeling by the state, that determine whether a particular judgment or disposition is or is not a "conviction" for the purpose of the deportation laws. If a state, by some quirk of local terminology, called a civil judgment a conviction, no one would argue that such a court order, because called a conviction, would automatically be a conviction within the meaning of the federal statute.

As the Massachusetts cases themselves illustrate, the words "conviction" and "convicted" have been variously defined for different purposes by the courts of a single state,[4] and

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[4] As the court below pointed out (R. 135–137), various meanings have been given to the term "conviction" in Massachusetts, depending on the purpose of the statute in which it is used. See *Commonwealth* v. *Gorham*, 99 Mass. 420, 422. Conviction has been held to mean a finding of guilty, without entry of judgment or imposition of sentence, in construing a constitutional provision which prohibited the executive from granting pardons "before conviction" (*Commonwealth* v. *Lockwood*, 109 Mass. 323, 325, 336–338); and in a statute authorizing the presiding judge of a superior court to report to the supreme judicial court doubtful questions of law relating to a person convicted in the superior court. *Commonwealth* v. *Baldi*, 250 Mass. 528, 536–537. A case "on file" was held to be a conviction in a statute providing for revocation of a pharmacist's license after "conviction by a court of competent jurisdiction" (*Munkley* v. *Hoyt*, 179 Mass. 108, 111). Conviction has been deemed to require judgment and sentence, as used in statutes permitting impeachment of a witness by showing his conviction for crime, *Commonwealth* v. *Gorham*, 99 Mass. 420, 422; *Fay* v. *Harlan*, 128 Mass. 244, 245; *Attorney General* v. *Pelletier*, 240 Mass. 264, 311; *Karasek* v. *Bockus*, 293 Mass. 371; *Boston* v. *Santosuosso*, 307 Mass. 302, 330–331; but see *Forcier* v. *Hopkins*, 329 Mass. 668, 669–671; and a statute providing that the conviction of

have different meanings from state to state. Thus, "conviction" has sometimes been defined to mean a simple finding of guilt by a judge or jury [5] and at other times to mean a sentence imposed after judgment of guilty has been entered on a finding.[6] In some states, a suspension of sentence or suspension of imposition of sentence prevents the proceeding from being construed as a conviction [7] while in other states it has no such effect.[8]

Accordingly, to make the application of Section 241 (a) (4) dependent upon the vagaries of state definitions of "conviction" would thoroughly destroy its uniformity and multiply administrative problems. In providing for deportation of aliens "convicted" of two crimes involving moral turpitude, Congress had a definite federal purpose primarily in view and was not merely aiding or supplementing state legislation. The cases cited by petitioner, as to what is considered a con-

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a licensee for violating any of the provisions of the laws relating to intoxicating liquors "shall of itself make the license of said person void," *Commonwealth* v. *Kiley*, 150 Mass. 325, 326.

[5] *Quintard* v. *Knoedler*, 53 Conn. 485; *State ex rel. Butler* v. *Moise*, 48 La. Ann. 109; *State* v. *Alexander*, 76 N. C. 231.

[6] *Daughtrey* v. *State*, 46 Fla. 109; *State* v. *Smith*, 129 Iowa 709; *Smith* v. *Vernon County*, 188 Mo. 501; *Commonwealth* v. *McDermott*, 224 Pa. 363.

[7] *People* v. *Fabian*, 192 N. Y. 443; *People ex rel. Marcley* v. *Lawes*, 254 N. Y. 249; *State Medical Board* v. *Rodgers*, 190 Ark. 266; *Baker* v. *Modern Woodmen of America*, 140 Mo. App. 619.

[8] *Hill* v. *State*, 92 Tex. Cr. 312, 314; *Wilmoth* v. *Hensel*, 151 Pa. 200.

viction by Massachusetts, are immaterial even if they did (as they do not) give specificity to that term under state law without regard to the context in which the word is used.* The problem here is first to ascertain in what sense the federal statute uses the term "conviction" and then to determine whether petitioner has been convicted in that sense.

B. AS USED IN THE NATIONALITY ACT, "CONVICTED" MEANS AN ADJUDICATION OF GUILT AND A FORMAL JUDGMENT WHICH ARE NO LONGER SUBJECT TO THE NORMAL PROCESSES OF APPELLATE REVIEW

It is clear from the Nationality Act, which provides for deportation of a person convicted of two crimes "regardless of whether confined therefor," that the imposition of a term of imprisonment is not necessary to render a judgment a "conviction." Prior to adoption of the Immigration and Nationality Act of 1952, its precursor, the Act of 1917, 8 U. S. C. (1946 ed.), Section 155 (a), had provided (Appendix, *infra*, p. 60):

> * * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of

* See footnote 4, *supra*, p. 17.

> conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * shall, upon warrant of the Attorney General, be taken into custody and deported * * *.

Under this language it was essential to prove, in addition to convictions for more than one crime involving moral turpitude, that the alien had been sentenced to imprisonment for a term of one year or more on each conviction.[10] The omission from the present Section 241 (a) (4) of a requirement of imprisonment reveals that it was the purpose of Congress to dispense with this element. That is also apparent from H. Rept. No. 1365, 82d Cong., 2d Session, accompanying H. R. 5678 which became the Immigration and Nationality Act of 1952, which lists as deportable aliens "who, within 5 years of entry, are convicted of a crime involving moral turpitude and sentenced to confinement for a year or more; or who, at any time after entry, are convicted of two such crimes, *whether or not confined.*" [Emphasis added.] The report goes on to state, at p. 60:

> * * * Thus, an alien who at any time after entry is convicted of two crimes involving moral turpitude is deportable, regardless of whether confined therefor, whereas under existing law the alien must

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[10] *United States ex rel. Griffo* v. *McCandless*, 28 F. 2d 287 (E. D. Pa); *United States ex rel. Mignozzi* v. *Day*, 51 F. 2d 1019, 1020 (C. A. 2).

> have been sentenced more than once to a term of a year or more because of such convictions.

Petitioner argues (Pet. Br. 25) that this change was inserted merely to overcome the effect of *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, where it had been held, under the old language, that sentenced "more than once" meant sentenced at two separate times. But that problem is covered by the language of the statute providing for deportation on conviction of two crimes "regardless of whether the convictions were in a single trial." The separate phrase "regardless of whether confined" must have been meant to eliminate the necessity for imprisonment. Furthermore, Section 242 (h) provides that:

> An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, *probation*, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation. [Emphasis added.]

Thus, the Act shows on its face that a person is deemed "convicted" under Section 241 (a) (4) when he is placed on probation, whether the trial court imposes a sentence of imprisonment or not.[11]

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[11] Under the Federal Probation Act a federal court may place a person convicted of a crime on probation and suspend the imposition of sentence. *Roberts* v. *United States*, 320 U. S. 264.

This is the normal sense in which "conviction" is used in federal law. See *Berman* v. *United States*, 302 U. S. 211, holding that a defendant was convicted though the trial court, after imposing sentence, had suspended its execution and placed the defendant on probation; *Korematsu* v. *United States*, 319 U. S. 432, holding that a judgment suspending imposition of sentence and placing the defendant on probation was final and appealable.[12] The test applied to determine if a defendant stands convicted is whether or not a final judgment has been entered by the court pursuant to a finding of guilt established by verdict or by plea.

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[12] By way of explaining the "judgment is sentence" phrase used in the *Berman* case, the Court, in the *Korematsu* opinion, states (pp. 434–435):

"In the *Berman* case, *supra*, we held that the appeal was proper where the sentence was imposed and suspended, and the defendant was placed on probation. The probationary surveillance is the same whether or not sentence is imposed. In either case, the probation order follows a finding of guilt or a plea of nolo contendere. Thereafter, the defendant must abide by the orders of the court. He must obey the terms and conditions imposed upon him, or subject himself to a possible revocation or modification of his probation; and under some circumstances he may, during the probationary period, be required to pay a fine, or make reparation to aggrieved parties, or provide for the support of persons for whom he is legally responsible * * *. He is under the 'supervision' of the probation officer whose duty it is to make reports to the court concerning his activities * * * and at 'any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue

What the statute does not make explicit is the degree of finality which a judgment must have in order to be deemed a conviction. The court below assumed that a judgment, albeit a conviction in normal use of that term so long as it stands unreversed, would not be considered a conviction for the purpose of the deportation statute while it was subject to attack on appeal. It is reasonable that the word "convicted" as used in the statute be given an interpretation which "will ensure that this legal determination has been made with reasonable certainty and finality" (R. 137).

On the other hand, as the court below also pointed out (R. 138), the term "convicted" cannot mean that a judgment must be so final that there is no possibility that it may ever be vacated. On that basis, very few judgments of conviction would fall within the statute since the federal courts, and some state courts, recognize a limited right to attack a judgment of conviction even after a sentence has been fully served. See *United States* v. *Morgan*, 346 U. S. 502. By providing in Section 242 (h), Appendix, *infra*, p. 58 (*supra*, p. 21), that deportation may be effected even though a defendant has been released on probation or

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a warrant for his arrest.' * * * These and other incidents of probation emphasize that a probation order is 'an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline.' *Cooper* v. *United States*, 91 F. 2d 195, 199."

parole, the Act shows that "convicted" is not used in the sense of being completely immune from any form of collateral attack since, even where the rule of the *Morgan* case is not applicable, collateral attack cannot be defeated on the ground of mootness while a person is serving a probationary period. The only reasonable interpretation of the statute is the one adopted by the court below, that person is deemed "convicted" under the Act when there has been a judgment on a finding of guilt which is no longer subject to reversal by the normal processes of appellate scrutiny.

C. THE COURTS BELOW, WHOSE SPECIAL COMPETENCE IN MATTERS OF STATE LAW THIS COURT RECOGNIZES, HAVE PROPERLY FOUND THAT PETITIONER WAS "CONVICTED"

The one question of state law in this case is what was the effect under the Massachusetts penal provisions of the procedures followed in the case of the petit larceny charge, *i. e.*, was there a finding of guilt and a final judgment? The courts below first determined that there were such effects and on that basis correctly found that they constituted a "conviction" for the purposes of the Immigration and Nationality Act. That may be the end of the matter under the rule, which this Court has reiterated many times, that it will "ordinarily accept the determination of local law by the Court of Appeals" (*Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 534), such courts being deemed "skilled in the law of particular states" in their circuit. *Propper* v. *Clark*, 337

U. S. 472, 486. See also *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708; *Steele* v. *General Mills, Inc.*, 329 U. S. 433, 439; *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237; *Palmer* v. *Hoffman*, 318 U. S. 109, 118; *Helvering* v. *Stuart*, 317 U. S. 154, 163; *MacGregor* v. *State Mutual Co.*, 315 U. S. 280, 281.

However, even if the question is considered *de novo*, we urge the Court to reach the same conclusion. The essence of what has happened to petitioner on the petit larceny charge meets the tests of a "conviction"—he has been subjected to discipline on an adjudication of guilt and the normal processes of appellate review are no longer open to him. It is clear that there has been an adjudication of guilt after trial, and that the alien has been subject to penal discipline. He was actually on probation for a year. It is also clear, as petitioner himself admits (Pet. Br. 12), that the ordinary procedure for review of that adjudication is not now open to him. Under Massachusetts law, the time to appeal from the adjudication of guilt was at the time sentence was imposed, or not at all. In *Mariano* v. *Judge of District Court*, 243 Mass. 90, the defendant, after a finding that he was guilty of maintaining a liquor nuisance, was sentenced to six months' confinement. The sentence was suspended during his good behavior and he was placed on probation for one year. At time of sentence he was notified of his right to appeal but did not avail himself

of it. When, during the period of the suspension, defendant was charged and found guilty of two other crimes, his probation was revoked, a new sentence to confinement was imposed, and he was ordered committed. Defendant then sought to appeal from the new sentence. The court rejected his appeal, holding (p. 92) that "appeal must be taken forthwith from all convictions where the sentence is suspended." It said (p. 93):

> It follows that the conviction of the petitioner occurred on the third of January, 1922. That was a final judgment, from which he could appeal. If he desired to appeal, then and then only was the time to exercise that right.

See also *Renado* v. *Lummus,* 205 Mass. 155; *Finer* v. *Commonweath,* 250 Mass. 493, 497, to the effect that, when a defendant waives appeal to accept a mitigation of the sentence, his guilt is conclusively adjudged.

Petitioner argues, however, that because, after the year's probation, the court made the entry "Sentence revoked On file" there was no longer a sentence which could be said to be a "conviction" under the Immigration and Nationality Act. But it is plain under Massachusetts law, as the court below noted (R. 134), that the placing of a case on file does not wipe out the adjudication of guilt; it is "a mere suspending of active proceedings in the case," *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133, 136. See also *Commonwealth*

v. *Carver*, 224 Mass. 42.[12] Petitioner himself so recognized when, in January 1953, he made a motion for a new trial, which was denied (R. 139, 4, 13).

The situation where proceedings are suspended before any sentence has been imposed is obviously quite different from that presented where the suspension occurs after a defendant has already been subjected to sentence. It appears from the very report of the Judicial Council of Massachusetts, Public Document No. 144, which petitioner reprints as an appendix to his brief (Pet. Br. 51–53), that in the latter situation, as a practical matter, the "on file" entry is merely a method of stating that the probationary period has been satisfactory and supervision will be terminated without further sentence but also without eradicating what has gone before. The revocation of the sentence was necessary here since the imprisonment was merely suspended for the duration of the probationary period and at its termination the sentence would have taken effect unless the court took some further action to dispense with the imprisonment. Since, therefore, the "on file" entry after probation does not

[12] This case differs from the California situation involved in *In re Ringnalda*, 48 F. Supp. 975 (S. D. Cal.), which petitioner cites (Pet. Br. 21), in that here there is a trial court record available as evidence, while in the California case the trial court, pursuant to statute, had not only revoked the sentence but also expunged the record.

take away the force of what has gone before, and since the prior occurrence—imposition of probation on a final adjudication of guilt—is clearly sufficient to constitute a conviction for the purposes of the federal statute, the court below was correct in holding that the disposition of the petit larceny charge against petitioner amounted to a conviction for the purposes of deportation.

Under these circumstances, it is immaterial whether or not petitioner would have a right of appeal in the unlikely event that the sentencing court should remove the case from its "on file" status and impose sentence. It is clear that petitioner has at present no immediate right of review such as the regular right of appeal from a sentence imposed immediately after the adjudication of guilt. Although the *Dowdican's Bail* case (115 Mass. 133) contains language which indicates that a defendant may petition for final disposition of a filed case, the Massachusetts court, in its later decision in *Commonwealth* v. *Carver*, 224 Mass. 42, declares that a case remains on file "unless and until the prosecuting attorney shall move for sentence." Since petitioner has chosen not to attempt to change the status of the case, he is not in a position to complain if the federal government considers the case in the status in which it now is.

Moreover, even if the court should remove the larceny case from file and sentence petitioner anew, it is doubtful whether he would have the right of appeal. In the *Mariano* case, the court held that a defendant's right of appeal accrued at the time of sentence and that he could not appeal when a new sentence was imposed during the period of probation. By a parity of reasoning, there should be no appeal if sentence is imposed after a case has been on file. Thus, the judgment appears to be, not only practically, but also technically, final as to the accused. But even if there is a right of appeal after a new sentence, that cannot be said to be the normal process of appellate review. Although different in character, it would at best be more akin to a right of collateral attack on a judgment and therefore not such a right as will defeat the final character of the adjudication for the purposes of deportation. There is at most merely a faint possibility that the conviction may be set aside, not an immediate right of review.

The actual incidents of the disposition of the petit larceny charge against petitioner clearly establish that there has been the imposition of discipline after a formal adjudication of guilt, and that the normal processes of appellate review are no longer available. Thus, the judgment is a "conviction" within the terms of Section 241 (a).

II.

PETIONER'S CONVICTION OF PETIT LARCENY WAS FOR A CRIME INVOLVING MORAL TURPITUDE

Although petitioner did not raise the point in his petition for a writ of habeas corpus in the District Court and did not urge it before the Court of Appeals (see R. 140), he did raise in the petition for certiorari, and now argues, the question whether a conviction for petit larceny involving the theft of twelve golf balls is a crime involving moral turpitude within the purview of Section 241 (a) of the Immigration and Nationality Act. The question has two aspects—(1) whether petit larceny *per se* normally carries the imputation of moral turpitude, and (2) whether the circumstances of the crime may be considered in determining the question of turpitude. It is the government's position that petit larceny normally and usually imports moral turpitude and that, whatever may be the rule where special circumstances are shown which indicate that in a particular case such a conviction does not involve a violation of common standards of morality, this has not been shown to be such a case.

A. PETIT LARCENY NORMALLY IMPORTS MORAL TURPITUDE

Petit larceny can and normally does carry the imputation of moral turpitude. The moral wrong in taking property of another does not depend upon the skill of the thief, or his good or bad for-

tune in making a lucky haul or a poor one. As the Court said in *Tillinghast* v. *Edmead,* 31 F. 2d 81, 83 (C. A. 1), a case involving a conviction of theft of $15 under the same section of Massachusetts law (General Laws, c. 266, Sec. 30) under which petitioner was convicted:

> * * * it appears that theft or larceny was a crime at common law involving an act intrinsically and morally wrong and malum in se, and does not acquire additional turpitude from being declared unlawful by the municipal law. In other words, that an act was at common law intrinsically and morally wrong, malum in se, does not become any more or any less so by reason of the fact that the Legislature may see fit to call it a felony, if the thing stolen is of a value exceeding a given amount, or to call it a misdemeanor, if the thing stolen is of less value. In either case the offense is one involving moral turpitude.

All the courts which have had occasion to consider the problem in the context of the deportation statute have so indicated. *Bartos* v. *United States District Court,* 19 F. 2d 722, 724–726 (C. A. 8); *Tillinghast* v. *Edmead,* 31 F. 2d 81, 83 (C. A. 1); *Ex parte Wilson,* 35 F. 2d 537, 538 (S. D. Cal); *Wilson* v. *Carr,* 41 F. 2d 704, 706 (C. A. 9); *United States ex rel. Ventura* v. *Shaughnessy,* C. A. 2, No. 23206, decided January 31, 1955; *United States ex rel. Amato* v. *Commissioner,* 18 F. Supp. 480, 481 (S. D. N. Y.); *United States ex rel. Fracassi* v. *Kar-*

nuth, 19 F. Supp. 581, 583 (W. D. N. Y.); *United States ex rel. Parenti* v. *Martineau,* 50 F. 2d 902, 903 (D. Conn.); *United States ex rel. Patricola* v. *Karnuth,* 9 F. Supp. 961, 963 (W. D. N. Y.); *United States ex rel. Rizzio* v. *Kenney,* 50 F. 2d 418, 419 (D. Conn.); *United States ex rel. Ulrich* v. *Kellogg,* 30 F. 2d 984, 986 (C. A. D. C.); *United States* v. *Muller,* 87 F. Supp. 285 (S. D. N. Y.).[14]

Nor is such a holding confined to deportation cases. As this Court pointed out in *Jordan* v. *De George,* 341 U. S. 223, 227, in which it considered the meaning of "moral turpitude" as used in the deportation statutes:

> The term "moral turpitude" has deep roots in the law. The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys and the revocation of medical licenses. Moral turpitude also has found judicial employment as a criterion in disqualifying and impeaching witnesses, in determining the measure of contribution between joint tort-feasors, and in deciding whether certain language is slanderous.

In the many applications noted by the Court petit larcency and equivalent misdemeanor offenses have been held to be crimes involving

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[14] In *United States ex rel. Rizzio* v. *Kenney,* 50 F. 2d 418, 419 (D. Conn.), in which the question was not directly in issue, there is a suggestion that "in unusual circumstances" theft might not involve moral turpitude.

moral turpitude,[18] on much the same reasoning as that of the court in the *Tillinghast* case, *supra*. See for example, *In re Henry*, 15 Idaho 755, 757–758, where a conviction of petit larceny was held to be a ground for disbarment, the court stating:

> * * * While it is true that the expression "moral turpitude" is not very accurately and concisely defined, and that the point at which an act begins to take on the color of turpitude is not very definitely marked and pointed out, still there can be no doubt in the mind of a man of ordinary intelligence but that he has long since passed into the confines of "moral turpitude" before he completes an act of larceny.

This consistent interpretation over the years in many contexts shows that larceny, even though designated petit, violates commonly accepted standards of morality. It is thus a crime involving moral turpitude in the sense that that term, with its "deep roots in the law", is used in the

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[18] Disbarment: *In re Henry*, 15 Idaho 755, 757; *In re Rothrock*, 25 Cal. 2d 588, 591. Revocation of license: *Bancroft* v. *Board of Governors*, 202 Okl. 108, 110. Slander: *Jones* v. *Brinkley*, 174 N. C. 23, 25. Impeachment of witness: *Bell* v. *Commonwealth*, 167 Va. 526, 531, 538; *Muse* v. *State*, 29 Ala. App. 271, 273; *Myles* v. *St. Louis Public Service Co.*, 52 S. W. 2d (Mo.) 595, 598; *Pendergraft* v. *State*, 107 Tex. Cr. 326, 328; *State* v. *Guyer*, 91 Vt. 290, 293; *Sweat* v. *State*, 132 Tex. Cr. 122, 123; *contra*, on the ground that petit larceny was no longer an "infamous crime," *Mulroy* v. *Prudential Insurance Co.*, 299 Ill. App. 598, 601–603.

statute.[18] Congress must have intended this phrase to reflect the "generally accepted moral conventions current at the time, so far as we [the court] could ascertain them." *United States v. Francioso,* 164 F. 2d 163 (C. A. 2). See also *United States ex rel. Iorio* v. *Day,* 34 F. 2d 920, 921 (C. A. 2); *Repouille* v. *United States,* 165 F. 2d 152, 153 (C. A. 2); *Sipp* v. *Coleman,* 179 Fed. 997, 998–999 (D. N. J.).

In *Jordan* v. *DeGeorge,* 341 U. S. 223, 229, in determining whether convictions of possessing whiskey and alcohol "with intent to sell it in fraud of law and evade the tax thereon" involved moral turpitude, this Court stated:

> In view of these decisions, it can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.

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[18] The definition of moral turpitude most often quoted appears to be Bouvier's *Dictionary,* Rawle's Rev., 1151, which states:

"Everything done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude."

A more comprehensive definition may be found in Black's *Law Dictionary* (3d ed.) at pp. 1765–1766:

"A term of frequent occurrence in statutes, especially those providing that a witness' conviction of a crime involving moral turpitude may be shown as tending to impeach his credibility. In general, it means neither more nor less than 'turpitude'; i. e., anything done contrary to justice, honesty, modesty, or good morals. * * *"

By the same token, an *animus furandi* would characterize crimes of stealing as involving moral turpitude.[17] The American courts have consistently regarded stealing, no matter what the amount, as within the class of crimes involving moral turpitude.

B. THERE IS NO OCCASION IN THIS CASE TO CONSIDER WHETHER THERE CAN EVER BE SPECIAL CIRCUMSTANCES SURROUNDING THE COMMISSION OF THE CRIME WHICH WOULD TAKE A CONVICTION OF PETIT LARCENY OUT OF THE GENERAL RULE SINCE PETITIONER'S CONVICTION HAS NOT BEEN SHOWN TO BE SUCH A CASE

It is conceivable that there may be circumstances where a particular act of stealing would not in context violate the normal, common standards of morality. Such a possibility obviously motivated the dissent of Judge Anderson in *Tillinghast* v. *Edmead, supra,* 31 F. 2d at p. 84, when he said, in the portion of his opinion quoted by the court below (R. 140):

> * * * It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should

[17] As the cases discussed in the text show, the fact that the offense is a misdemeanor rather than a felony does not affect its quality as involving moral turpitude. This conclusion is supported by the background of the statute. Reference to moral turpitude initially appeared in the Act of March 3, 1891, 26 Stat. 1084, in the provision directing the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Thus, from the start, moral turpitude was considered to embrace misdemeanors.

be tainted as guilty of a crime of moral turpitude.

The court below was of the view that no such circumstances could ever be considered; that (R. 140)

> If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity.

The court pointed out that Congress did not overlook the possibility of extenuating circumstances in a particular case since it provided that deportation should not result if the sentencing judge recommended against deportation and that deportation does not result if an unconditional pardon has been granted for the crime.

This holding of the court below is supported by the great weight of authority in the relatively few lower court cases where this question has been raised with respect to petit larceny (see *supra*, pp. 31–32). And the general rule in deportation has been that the nature of the crime is conclusively established by the record. *Tillinghast* v. *Edmead, supra; United States ex rel. Giglio* v. *Neelly*, 208

F. 2d 337, 340 (C. A. 7); *United States ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757, 758 (C. A. 2). That was the approach taken by this Court in *Jordan* v. *De George*, 341 U. S. 223, when it looked merely to the elements of the crime charged in determining whether the crime was one involving moral turpitude. It is not the function of immigration officials to retry a criminal case, often long after the event. Obviously, no immigration officer or court on review could retry the issue of guilt or innocence, which had been determined by a court under all the constitutional safeguards which inure to a criminal trial. Matters going to mitigation of the crime—such as purpose, motive, and knowledge—would normally be so intertwined with the issue of criminal intent that an attempt to determine whether there were mitigating circumstances would most often, if not almost always, involve a redetermination of guilt. Moreover, as the court said in *United States* v. *Uhl*, 203 Fed. 152, 153 (S. D. N. Y.), affirmed, 210 Fed. 860 (C. A. 2):

> In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judg-

ments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion,

necessary for the efficient administration of the immigration laws.[18]

It is not necessary to urge, nor for this Court now to decide, that never, in any conceivable circumstances, could the immigration authorities, in determining whether a crime involves moral turpitude, look beyond the record of conviction as that is normally defined—the charge or indictment, the plea, the verdict, and the sentence. See 37 Op. Atty. Gen. 293 (1933); 39 Op. Atty. Gen. 95 (1937). It might appear appropriate, and consistent with the legislative policy embodied in the moral turpitude provision, to hold that petit larceny could in some circumstances be regarded as not necessarily involving moral turpitude. But it

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[18] In a very recent case decided by the Second Circuit but not yet officially reported, *United States, ex rel Ventura* v. *Shaughnessy*, decided January 31, 1955 (*supra*, p. 31), the issue was whether the government had established that the alien had been convicted in Portugal of a crime involving moral turpitude prior to his entry into this country. In the last paragraph of the decision, the court states that it has not considered statements, which it apparently thought to be against his interest, contained in an affidavit by the alien on the ground the affidavit was not before the inquiry officer. In that statement the alien admitted being convicted and sentenced for the crime of theft in that he purchased two sacks of corn meal knowing them to have been stolen. The same affidavit states that the alien stole to feed his family. The court does not expressly indicate whether that factor would have carried any weight with it if it had considered the affidavit as part of the record, but the inference is that the alien's assertions, even if taken as true, would not have changed the result.

is sufficient for present purposes that this is not such a case.

Once it is conceded, as it must be, that the one issue which the immigration authorities and the reviewing courts may not take into consideration is the issue of guilt or innocence, then the only possibly extenuating circumstance revealed by the present record is that the object of the theft was an inexpensive item of sports equipment. It is submitted that this fact is not enough, by and of itself, to remove the crime of larceny, which in most circumstances undoubtedly involves moral turpitude, from the category of offenses which brand the offender as morally undesirable. The elements which render larceny morally culpable can well exist even though the gain is as small or insignificant as the goods stolen in this case. If the circumstances of this particular theft were nevertheless such as to negative moral turpitude and if the courts may consider such factors, then the burden was certainly on the petitioner to come forward with proof of these circumstances. The immigration authorities cannot have the burden of probing the background of each conviction. But it is a signal fact that petitioner has never attempted to bring before the immigration authorities or the courts any evidence, or even any assertion, that such special circumstances do exist. In fact, before the petition for certiorari in this Court, the petitioner never even raised the issue

of whether the crime was one involving moral turpitude.[19]

On the present record, the only real significance of the fact that the items stolen were twelve golf balls is that the crime was petit larceny, which, under Massachusetts Law (G. L. Chap. 266, Sec. 30), is the theft of property of a value of less than one hundred dollars.[20] Once it is established, as the cases cited *supra,* pp. 31–32 settle, that petit larceny does as a general matter involve moral turpitude, then it would be petitioner's burden to come forward with any special circumstances which remove his offense from the general category. That he has not done or tried to do.[21] Accordingly, his case is governed by the general rule.

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[19] It is not without weight that the petitioner was 41 years old at the time of the theft so that this was not a youthful aberration. The record further indicates that petitioner had had prior, and subsequent, brushes with the law. The charge was contested and he was tried and found guilty, not once, but twice, so that if he had defenses it must be assumed he presented them.

[20] Actually, the Massachusetts law includes grand larceny and petit larceny in the very same section (and sentence) of its General Law, the only differentiation being that the severity of the sentence is reduced for thefts of less than one hundred dollars.

[21] Petitioner's brief in this Court (Br. 36) states unequivocally that the criminal act must be judged by the statute forbidding it and the court record. "These and only these must indicate its character."

III

SECTION 241 (A) (4) APPLIES TO CONVICTIONS WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE IMMIGRATION AND NATIONALITY ACT OF 1952

Petitioner argues (Pet. Br. 43–47) that, as a matter of statutory construction, the provisions of Section 241 (a) (4) making deportable an alien "who at any time after entry is convicted of two crimes involving moral turpitude,* * * regardless of whether confined therefor" should be read to apply only to convictions occurring after the effective date of the Act. The answer to this contention is that Section 241 (d) explicitly provides that, except as otherwise provided in the section, the whole of Section 241 (a) has application to events which preceded the Act. Section 241 (d) states:

> Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

No specific language is used in Section 241 (a) (4) which exempts it from the retrospective application Section 241 (d) provides it shall have. This is evident from a comparison of the language of subsection (4) with that of subsections (3) and (11), Appendix *infra*, pp. 52, 54, where the precise word "hereafter" is used to indicate that the latter subsections have only prospective operation. Petitioner retorts that Congress used the present, not the past, tense in the phrase "is convicted." But the use of the present tense in statutes is familiar draftsmanship not designed to include or exclude past or future acts; rather, it is intended to read as speaking as of all times to which by law it is applicable. The word "is" is wholly neutral and furnishes frail support for an attempt to take Section 241 (a) (4) out of the reach of Section 241 (d) as a provision "otherwise specifically provided."

There is additional support for this conclusion. Section 19 of the Act of February 5, 1917, 39 Stat. 874, 889, 8 U. S. C. (1946 ed.) 155 (a), the predecessor of present Section 241 (a) (4), had provided for the deportation of any alien "who is *hereafter* sentenced more than once" (see Appendix, *infra*, p. 60, emphasis added). The fact that in 1952 Congress dropped the word "hereafter" indicates its specific purpose to eliminate the concept that only subsequent events were to be considered and, therefore, to include antecedent con-

victions. And the legislative proceedings which led to adoption of Section 241 (a) (4) show that Congress intended to amend the law to facilitate deportation of alien criminals. In House Report No. 1365, 82nd Cong., 2nd Sess., on H. R. 5678, which became the Immigration and Nationality Act of 1952, the Committee on the Judiciary, under the caption "Basic Changes" wrote (p. 28):

> 5. Broadens the grounds for exclusion and deportation of criminal aliens mostly in accordance with recommendations made by the Senate Special Committee to Investigate Organized Crime in Interstate Commerce.[22]

The Committee on the Judiciary of the Senate, commenting on the deportation of alien criminals, wrote in S. Rept. No. 1515 (81st Cong., 2d Sess.), pp. 391–392:

> It is the opinion of the subcommittee that the deportation provisions with respect to aliens who have been convicted of a

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[22] In S. Rept. No. 307 (82d Cong., 1st Sess.) the Special Committee to Investigate Organized Crime in Interstate Commerce recommended, on p. 15, that:

"xiii. The immigration laws should be amended to facilitate deportation of criminal and other undesirable aliens. To this end, the committee recommends the adoption of the legislative proposal heretofore recommended by the Commissioner of Immigration and contained in section 241 of S. 716 (82d Cong.), now pending before the Senate Judiciary Committee." Section 241 (a) (4) of S. 716 was couched in substantially the same language as Section 241 (a) (4) of the Act and also deleted the word "hereafter" as it appeared in the 1917 statute.

crime involving moral turpitude should be retained in the law with some modification. The subcommittee holds that there is ample justification for subjecting to deportation at any time after entry, aliens who were convicted or who admit the commission of such a crime, prior to entry into this country.

As to such crimes committed subsequent to the time of the alien's entry, it is held that deportation should be required, in the case of a single conviction, only if the conviction occurred within 5 years after entry and resulted in confinement in a prison or corrective institution for a year or more. In the case of an alien convicted of two such crimes at any time after entry not arising out of a single scheme of criminal misconduct, the alien is deportable regardless of whether sentenced to confinement.

The avowed purpose at least to preserve the grounds for deportation of alien criminals previously convicted explains the deletion of the word "hereafter" so as to give the section retrospective as well as prospective application. To read Section 241 (a) (4) as having prospective application alone would be squarely contrary to that congressional aim. Since 1917, Congress has provided for the deportation of aliens convicted and sentenced for two crimes, and it is evident that Congress did not, in 1952, intend to have

Section 241 (a) (4) apply only to persons convicted of two crimes after 1952.

Petitioner argues, however, that there is no need to give Section 241 (a) (4) retrospective application since the provisions of Section 19 of the Act of February 5, 1917 (8 U. S. C. (1946 ed.) 155), Appendix, *infra*, p. 60, making an alien deportable when he has twice been convicted and sentenced for more than one year for crimes involving moral turpitude, are continued in force by virtue of the savings clause, Section 405 of the Act of June 27, 1952. That section provides:

> (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

Even assuming that a person convicted and sentenced to imprisonment for two crimes before December 1952 would be deportable under the Act

of 1917, by virtue of the savings clause, even though no deportation proceedings were pending against him when the 1952 Act became effective, the savings clause would not, in a normal construction, cover the situation where an alien had been convicted of one crime before 1952, and then was convicted of a second crime after 1952. In such a situation, under petitioner's construction of the 1952 statute, the alien would not be deportable under the 1952 statute, and would also not be deportable under the 1917 Act, which except to the extent that the savings clause applies, was expressly repealed by the Act of 1952. Section 403 (a) (13) of the Act of 1952. Such a result would, of course, be contrary to the evident Congressional purpose.

Reading Section 241 (a) (4) and Section 241 (d) together, the construction which most clearly accords with the Congressional purpose is the one adopted by the court below, that Section 241 (a) applies to any two convictions after the entry of the alien into the United States even though, in the words of Section 241 (d), the alien "entered the United States prior to the date of enactment of this Act", and even though "the facts, by reason of which any such alien belongs to any of the classes enumerated" (in this case the two convictions) "occurred prior to the date of enactment".

IV

THERE WERE NO PROCEDURAL DEFECTS IN THE HEARING WHICH WOULD INVALIDATE THE ORDER OF DEPORTATION

Petitioner also contends (Pet. Br. 47–50) that there were procedural defects in his hearing which require that he be given a new hearing even if this Court should decide that, on the admitted relevant facts relating to his convictions, he is deportable as a matter of law. The court below was correct in finding no merit in petitioner's contentions.

He argues that the hearing officer did not act in a judicial capacity as required by Section 242 (b) of the statute because he permitted the introduction, as "cumulative evidence", of reports of petitioner's past arrests. He also says that the hearing officer showed he was not acting judicially when, in response to an objection as to a question about arrest, the hearing officer said (R. 17):

> A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act.

These actions do not indicate that the Special Inquiry Officer was acting in other than a judicial capacity. He was exercising his statutory authority to "interrogate, examine and cross-ex-

amine the alien." In his colloquy with petitioner's counsel he did no more than give a terse and accurate description of the purpose of the hearings. Section 242 (b) of the Act of 1952, in outlining the duties of a special inquiry officer conducting proceedings to determine the deportability of an alien, provides:

> * * * No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.

Petitioner neither alleges that the Special Inquiry Officer participated in the investigation of this case, nor charges that he performed any prosecutive functions other than as permitted by Section 242 (b). At no time did the hearing officer transgress the limits of his judicial role as prescribed by the statute.

Inclusion in the record of the deportation hearings of copies of records from the Massachusetts Board of Probation and the Federal Bureau of Investigation, admitted by petitioner to relate to him, did not harm or prejudice petitioner so as to vitiate the proceeding. The presence of some irrelevant evidence in the record does not contaminate the entire proceeding. *Bilokumsky* v. *Tod,* 263 U. S. 149; *Tisi* v. *Tod,* 264 U. S. 131. In a habeas corpus petition the court will examine

the record only to determine whether the proceeding was intrinsically fair, *Bridges* v. *Wixon*, 326 U. S. 135,[28] and whether there was reliable and probative evidence to support a finding that the alien was deportable. *Schoeps* v. *Carmichael*, 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914. The courts will not intervene to correct procedural irregularities which do not, and cannot, work prejudice to the alien. *Sumio Madokoro* v. *Del Guercio*, 160 F. 2d 164, 167 (C. A. 9), certiorari denied, 332 U. S. 764.

As noted above, the essential facts on which petitioner's deportability must be determined are matters of official record admitted by petitioner to relate to him. The Special Inquiry Officer repeatedly stated to petitioner that the evidence consisted of certified copies of records of his convictions in the Massachusetts courts (R. 19, 21, 124) and that the decision did not rest on the F. B. I. arrest record (R. 25). Since the list of petitioner's arrests neither added to nor detracted from the evidence adduced to support the order of deportation, it cannot be said that they worked to the prejudice of petitioner who had already

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[28] In *Bridges* v. *Wixon*, 326 U. S. 135, at 156, the Court, relying on *Vajtauer* v. *Commissioner*, 273 U. S. 103, 106, said:

"In these *habeas corpus* proceedings the alien does not prove he had an unfair hearing merely by * * * showing that incompetent evidence was admitted and considered."

admitted the essential facts upon which the order for his deportation was based. The issues as to whether the crimes for which petitioner had been convicted involved moral turpitude and were in fact convictions arise here on undisputed facts and depend upon application of legal principles which are subject to review by the courts. Hence, the admission of irrelevant evidence of petitioner's criminal record, or an attempt to discover whether there were grounds for petitioner's deportation other than those charged in the warrant of arrest, could not have affected the essential issues resolved at the hearing.

CONCLUSION

It is therefore respectfully submitted that the order of the court below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

JOHN F. DAVIS,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

MARCH, 1955.

APPENDIX

1. The Immigration and Nationality Act of June 27, 1952, provides in pertinent part:

Section 241 (a) (8 U. S. C. 1251 (a), 66 Stat. 204):

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;
>
> (3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States;
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether con-

fined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (c) of this title, or under section 36 (c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or has been convicted under section 1546 of title 18 of the United States Code;

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * *

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a), unless the Attorney General is satisfied, in the case of any alien within category (C) of paragraph (29) of such section, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 7 of the Subversive Activities Control Act

of 1950 have such knowledge or reason to believe) that such organization was a Communist organization;

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory transportation company under section 238 (a) and was without the required period of stay in such foreign contiguous territory or adjacent islands following such arrival (other than an alien who is a native-born citizen of any of the countries enumerated in section 101 (a) (27) (C) and an alien described in section 101 (a) (27) (B));

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importa-

tion or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212 (a); or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of

any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: * * *.

(18) has been convicted under section 278 of this Act or under section 4 of the Immigration Act of February 5, 1917.

* * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * *

Section 242 (b) (8 U. S. C. 1252 (b), 66 Stat. 209):

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to

be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

Section 242 (h) (8 U. S. C. 1252 (h), 66 Stat. 212):

An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

* * * * *

Section 403 (a) (13) (66 Stat. 279):

(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

* * * * *

(13) Act of February 5, 1917 (39 Stat. 874);

* * * * *

Section 405 (a) (66 Stat. 280).

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, procedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be re-

garded as a proceeding within the meaning of this subsection.

2. Section 19 of the Immigration Act of 1917, 39 Stat. 889, provided:

> That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported: * * *.

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DECISIONS PER CURIAM AND ORDERS FROM APRIL 11 THROUGH JUNE 6, 1955.

APRIL 11, 1955.

Decisions Per Curiam.

No. 333. PINO *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 348 U. S. 870, to the United States Court of Appeals for the First Circuit. Argued March 30, 1955. Decided April 11, 1955. *Per Curiam:* On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of § 241 of the Immigration and Nationality Act. The judgment is reversed. *Reuben Goodman* argued the cause for petitioner. With him on the brief were *Paul T. Smith* and *Jacob Spiegel*. *John F. Davis* argued the cause for respondent. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard*. Reported below: 215 F. 2d 237.